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DOCUMENTS OF TITLE: A COMPARISON OF THE
UNIFORM COMMERCIAL CODE AND OTHER
UNIFORM ACTS, WITH EMPHASIS ON
MICHIGAN LAW*

Douglass Boshkoff†

IN 1909 the Michigan legislature enacted the Uniform Warehouse Receipts Act and two years later adopted its companion, the Uniform Bills of Lading Act. These two acts were followed by the Uniform Sales Act which went into effect in 1913. The first two acts are devoted exclusively to the subject of documents of title. The Sales Act contains some parallel provisions relating to the negotiation and transfer of such documents.

Currently, a committee of the Michigan State Bar Association is studying and evaluating the 1958 official text of the Uniform Commercial Code which has already been adopted in eight states.¹ Article 7 of the Code, dealing with the subject of documents of title, is a marriage of the Uniform Warehouse Receipts and Bills of Lading Acts and, as is true in most marriages, the parties are changed by the ceremony. The purpose of this discussion is to examine article 7 against the background of Michigan cases and statutes with the hope that it will stimulate discussion of one part of the Code and provide some foundation for reader evaluation. It can be expected that the study now under way in Michigan will have future counterparts in other jurisdictions.

Although this article is mainly oriented toward the legal materials of one jurisdiction, the presence of a fairly common background of uniform acts makes it relevant to other jurisdictions, except where there are contrary interpretations of a particular statutory provision. Therefore, parallel citations to the

* This article is a by-product of a study of Article 7 of the Uniform Commercial Code prepared for a committee of the Michigan State Bar Association, but the views expressed are those of the author and are not to be attributed either to the Bar Association or to any of its committees.

Article 7 has received some previous attention, although relatively slight in volume compared to comments on some other articles of the Code. BRAUCHER, *DOCUMENTS OF TITLE* (1958) is the best and most detailed analysis of article 7 and is referred to throughout this article.

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¹ Kentucky, Massachusetts, Pennsylvania, Connecticut (effective October 1, 1961), New Hampshire (effective July 1, 1961), and Rhode Island (effective January 1, 1962). See Malcolm, *The Uniform Commercial Code: Review, Assessment, Prospect—November 1959*, 15 BUS. LAW. 348, 353 (1960) and Moore, *Developments in Factoring, Inventory Liens and Accounts Receivable Financing*, 15 BUS. LAW. 995 (1960). Arkansas and Wyoming have recently joined the list of states enacting the Code. CCH CORP. L. GUIDE, No. 56, p. 7 (March 14, 1961).

various uniform acts have been provided with the hope that this article will be of assistance to other groups attempting to evaluate article seven of the Uniform Commercial Code.

Before dealing with specific topics, a brief survey of the current statutory scheme is worthwhile. The most comprehensive regulation of documents of title is found in the Uniform Warehouse Receipts² and Bills of Lading Acts³ which set forth the obligations of warehousemen and carriers, and define the rights of persons who deal in documents representing goods held by such bailees. The Uniform Sales Act⁴ covers only the rights of persons buying and selling these documents and in the case of inconsistent treatment the first two acts control.⁵ These acts, hereinafter referred to as the UWRA, UBLA, and USA, respectively, would be specifically repealed by the Code.⁶ Scattered elsewhere throughout the Michigan statutes are other acts, ranging from ancient to modern, which are also relevant to the discussion.⁷ Warehouse receipts, in particular, have been the beneficiaries of legislative attention. Apart from UWRA, statutes were passed in 1846, 1895, 1905, and 1939⁸ which in some cases contain duplicating or contradictory provisions. Thus the contents of a ware-

² MICH. COMP. LAWS 443.1-58 (1948), MICH. STAT. ANN. §§ 19.421-478 (1959).

³ MICH. COMP. LAWS §§ 482.1-54, .56 (1948), MICH. STAT. ANN. §§ 22.1121-1174, .1176 (1959).

⁴ MICH. COMP. LAWS §§ 440.27-40 (1948), MICH. STAT. ANN. §§ 19.267-280 (1959).

⁵ MICH. COMP. LAWS § 440.76 (1948), MICH. STAT. ANN. § 19.318 (1959).

⁶ UNIFORM COMMERCIAL CODE § 10-102. See also § 10-103.

⁷ MICH. COMP. LAWS §§ 285.61-.80, .82 (1948), MICH. STAT. ANN. §§ 12.119(1)-(20), (22) (1958) (Farm Produce Storage Act); MICH. COMP. LAWS §§ 434.101-.112 (1948), MICH. STAT. ANN. §§ 18.721-732 (1959) (disposition of unclaimed property); MICH. COMP. LAWS §§ 440.27-40 (1948), MICH. STAT. ANN. §§ 19.267-280 (1959) (Uniform Sales Act); MICH. COMP. LAWS §§ 443.1-58 (1948), MICH. STAT. ANN. §§ 19.421-478 (1959) (Uniform Warehouse Receipts Act); MICH. COMP. LAWS §§ 444.1-27 (1948), MICH. STAT. ANN. §§ 19.491-517 (1959) (regulating warehouses); MICH. COMP. LAWS §§ 444.101-109 (1948), MICH. STAT. ANN. §§ 19.521-529 (1959) (warehousing of farm produce); MICH. COMP. LAWS §§ 462.2-50 (1948), MICH. STAT. ANN. §§ 22.21-68 (1959) (Railroad Commission); MICH. COMP. LAWS §§ 466.20-21 (1948), MICH. STAT. ANN. §§ 22.279-280 (1959) (criminal provisions relating to bills of lading predating the Uniform Bills of Lading Act); MICH. COMP. LAWS § 467.151 (1948), MICH. STAT. ANN. § 22.1182 (1959) (liability of railroads); MICH. COMP. LAWS § 468.321 (1948), MICH. STAT. ANN. § 22.751 (1959) (sale of perishable freight by carriers); MICH. COMP. LAWS § 469.461 (1948), MICH. STAT. ANN. § 22.1081 (1959) (grain deliveries by railroads); MICH. COMP. LAWS §§ 469.501-502 (1948), MICH. STAT. ANN. §§ 22.1191-1192 (1959) (liability of railroads); MICH. COMP. LAWS §§ 482.1-56 (1959), MICH. STAT. ANN. §§ 22.1121-1176 (Uniform Bills of Lading Act); MICH. COMP. LAWS § 483.227 (1948), MICH. STAT. ANN. § 22.1297 (1959) (pipe line companies).

⁸ MICH. COMP. LAWS §§ 434.101-.112 (1948), MICH. STAT. ANN. §§ 18.721-732 (1959); MICH. COMP. LAWS §§ 444.1-27 (1948), MICH. STAT. ANN. §§ 19.491-517 (1959); MICH. COMP. LAWS §§ 444.101-109 (1948), MICH. STAT. ANN. §§ 19.521-529 (1959); MICH. COMP. LAWS §§ 285.61-.80, .82 (1948), MICH. STAT. ANN. §§ 12.119(1)-(20), (22) (1959).

house receipt are set forth in four separate enactments.⁹ Under the UWRA the negotiability of a warehouse receipt is determined by its delivery terms, and negotiability cannot be destroyed by a stipulation of non-negotiability inserted in the receipt.¹⁰ An earlier statute, still in existence, provides that all warehouse receipts are negotiable unless marked non-negotiable.¹¹ This obvious contradiction is resolved because the UWRA repealed all inconsistent legislation,¹² but the fact remains that the lawyer consulting the statutes must, in this and other situations, decide to what extent they are inconsistent, whether they are repealed by legislation, and whether more than one statute is applicable. The Attorney General of Michigan has taken the reasonable position that all statutes predating the UWRA are still in force unless plainly inconsistent.¹³

Consideration of the Code is worthwhile even if it only forces a survey of the law we now have in this area; but if the Code is enacted, more study is demanded because article 7 will not replace all existing statutes pertaining to documents of title. Here it is recognized that there is likely to be widespread state regulation of the persons or firms offering storage or shipping services and also substantial differences of opinion as to the extent and manner of such regulation. Therefore, the Code attempts merely to deal with the rights created by the issuance of documents of title and leaves regulation of the bailees' services to the several states. Thus section 10-104 provides:

"The Article on Documents of Title (Article 7) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (Section 1-201)."¹⁴

⁹ MICH. COMP. LAWS § 285.69 (1948), MICH. STAT. ANN. § 12.119 (9) (1959); MICH. COMP. LAWS § 443.2 (1948), MICH. STAT. ANN. § 19.422 (1959); MICH. COMP. LAWS § 444.7 (1948), MICH. STAT. ANN. § 19.497 (1959); MICH. COMP. LAWS § 444.101 (1948), MICH. STAT. ANN. § 19.521 (1959).

¹⁰ MICH. COMP. LAWS §§ 443.3-5 (1948), MICH. STAT. ANN. §§ 19.424-425 (1959).

¹¹ MICH. COMP. LAWS § 444.8 (1948), MICH. STAT. ANN. § 19.498 (1959).

¹² UNIFORM WAREHOUSE RECEIPTS ACT, 60 Mich. Laws 1909, No. 303, § 59 (repealed by Public Act 267, 1945, on the theory that it was no longer necessary).

¹³ [1917] MICH. ATT'Y GEN. REP. 358.

¹⁴ See also UNIFORM COMMERCIAL CODE § 7-103, §7-201, comment.

The present statutes contain a mixture of regulatory and substantive provisions. A good illustration is the Farm Produce Storage Act of 1939 which contains licensing provisions which are clearly regulatory¹⁵ and also defines the rights of a depositor of commingled fungible farm produce,¹⁶ equally clearly a matter within the scope of article 7.¹⁷ If this statute were left untouched, it could be a booby trap for the unwary.¹⁸ Thus, serious consideration of the Code would also require careful examination of the Michigan statutes.

Returning to the Code, we will see that the marriage ceremony proposed by article 7 has caused some changes. Many of these are not revolutionary but evolutionary. Fifty years of operation under the UWRA, UBLA and USA have indicated a need for reconsideration of some of their provisions. Further, although there have been changes in detail, many of the new concepts in article 7 come not from the changed statutory language but in provision for situations on which the present acts are silent. Lastly, there are changes required by new concepts in the law of sales.

I. TRANSACTIONS SUBJECT TO CODE PROVISIONS

A. *Multi-State Transactions*

If all parts of a transaction involving a document of title occur in Michigan then the law of this state is obviously applicable, but there are situations in which several jurisdictions may be involved. For instance, a receipt issued by an Ohio warehouse might be pledged in Michigan, a bill of lading for goods shipped between Detroit and New York might be pledged in Massachusetts, or an overseas bill of lading for goods shipped from England to Detroit might be negotiated in Michigan. In any of these situations if suit is brought in Michigan to adjudicate rights conferred by the particular document of title, the Michigan court must initially make a choice as to the applicable law.

¹⁵ E.g., MICH. COMP. LAWS § 285.70 (1948), MICH. STAT. ANN. § 12.119(10) (1959) (failure to issue proper receipt grounds for revocation of license).

¹⁶ MICH. COMP. LAWS § 285.73 (1948), MICH. STAT. ANN. § 12.119(13) (1959).

¹⁷ UNIFORM COMMERCIAL CODE § 7-207 (2).

¹⁸ A word of explanation: inconsistent, parallel or interlocking statutes are no booby trap for the diligent lawyer who has the time to puzzle through the legalistic maze; but the diligent may sometimes be hurried by a client and, even if he is not, why should he be forced to reconcile different statutes when the need for such statutes is not clear? His life is already made difficult by the constant onrush of new statutes, decisions, and administrative rulings. He is entitled to a set of statutes which are as clear as the legislature can make them; in this area a good spring cleaning is in order.

Insofar as there is, in any of these cases, a federal enactment governing the rights of the parties, federal law must be applied.¹⁹ Perhaps the most familiar example is the Federal Bills of Lading Act,²⁰ which applies when a bill of lading is issued by a common carrier in interstate commerce or in foreign commerce where the originating point of shipment is in the United States.²¹ But this act does not apply to a bill of lading issued in London for shipment to Detroit,²² and, while other federal statutes govern some aspects of the transaction, none spell out the rights of a person taking the bill of lading as a purchaser in Michigan.²³

Unlike the Uniform Acts which it replaces, the Code establishes a choice of law rule which is applicable to documents of title. It is as follows:

“ . . . [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.”²⁴

Neither “reasonable” nor “appropriate” is defined in the Code although there are official comments explaining the concepts.²⁵

¹⁹ UNIFORM COMMERCIAL CODE § 7-103.

²⁰ 39 Stat. 538-45 (1916), 49 U.S.C. §§ 81-124 (1958).

²¹ 39 Stat. 538 (1916), 49 U.S.C. § 81 (1958).

²² *Archibald & Lewis Co. v. Banque Internationale de Commerce*, 216 App. Div. 322, 214 N.Y. Supp. 366 (1926); *Chesapeake & O.R.R. v. State Nat'l Bank*, 280 Ky. 444, 133 S.W.2d 511 (1939) (dictum); 2 WILLISTON, SALES § 406a (1948).

²³ Neither the Harter Act, 27 Stat. 445-46 (1893), 46 U.S.C. §§ 190-96 (1958), nor the Carriage of Goods by Sea Act, 49 Stat. 1207-13 (1936), 46 U.S.C. §§ 1300-15 (1958), prescribe the requirements of proper negotiation of an ocean bill of lading. If the bill was issued for a shipment from London to Detroit, Michigan law could properly be applied to resolve this issue.

There is little federal law pertinent to warehousing. The United States Warehouse Act, 39 Stat. 486-91 (1916), 7 U.S.C. §§ 241-73 (1958), regulates the warehousing of goods stored for interstate or foreign commerce or in a warehouse located in a place under exclusive federal jurisdiction. See also 54 Stat. 1019 (1940), 7 U.S.C. § 608(f) (1958). This regulation would not substantially conflict with state regulation under the Code.

²⁴ UNIFORM COMMERCIAL CODE § 1-105 (1).

²⁵ UNIFORM COMMERCIAL CODE § 1-105, comments 1 and 2 state:

“1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right . . . is limited to jurisdictions to which the transaction bears a ‘reasonable relation.’ In general, the test of ‘reasonable relation’ is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.* . . . Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

There are no Michigan cases delineating choice of law principles applicable to documents of title.²⁶ Suppose that negotiable warehouse receipts issued in a foreign jurisdiction are pledged in Michigan. Orthodox conflicts principles would indicate a reference to the law of the situs of the property for a determination of the pledge's validity.²⁷ However, if the code was in effect and suit was brought in Michigan and it was found, absent any agreement as to the applicable law, that the pledge created an appropriate relationship with this state, Michigan law would apply to all aspects of the transaction.²⁸

B. *Specific Types of Intra-State Transactions*

Because of broadened definitions of persons and documents governed by its provisions, the Code would bring to Michigan a more comprehensive set of rules applicable to documents of title. At present only warehouse receipts and bills of lading issued by a common carrier receive complete statutory attention because of

"2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an 'appropriate' relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not 'appropriate' include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code."

²⁶ No inquiry has been made into the question whether a Michigan court would draw upon contract principles in resolving multi-state document of title questions. Stipulations in various contracts concerning the applicable law have been validated where the stipulated state is the place of contracting, *Rubin v. Gallagher*, 294 Mich. 124, 292 N.W. 584 (1940), or the place of performance, *Russell v. Pierce*, 121 Mich. 203, 80 N.W. 118 (1899). See also *Richardson v. Rogers*, 45 Mich. 591, 8 N.W. 526 (1881).

²⁷ *Hallgarten v. Oldham*, 135 Mass. 1 (1883); *Swedish-American Nat'l Bank v. First Nat'l Bank (In re St. Paul & K. C. Grain Co.)*, 89 Minn. 98, 94 N.W. 218 (1903).

²⁸ Under the proposed draft of the *Restatement of Conflict of Laws*, the question whether a particular document can, under any circumstances, control title to a chattel is determined by the law of the situs of the property at the time the document was issued. *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 261 (1) (Tent. Draft No. 5, 1959). If there is an affirmative answer to this question, the validity of a conveyance of an interest in the chattel is determined by the law of the situs of the chattel at the time of the conveyance. In most cases this will mean a reference to the law of the jurisdiction where the document itself was transferred. *Id.* §§ 261 (2), (3). Section 1-105 (1) of the Code abandons this scheme of reference and, where an appropriate relationship is found, commands courts in states adopting the Code to apply it to all aspects of the transaction. *Cf. id.* § 98 (1), comments *d, h*; § 99 (Tent. Draft No. 4, 1957); § 346n (Tent. Draft No. 6, 1960).

See also Goodrich, *Conflicts Niceties and Commercial Necessities*, 1952 WIS. L. REV. 199; Hawkland, *In Re Articles 1, 2 and 6*, 28 TEMP. L.Q. 512 (1955); BRAUCHER, DOCUMENTS OF TITLE 6-8, 13-15 (1958); NEW YORK LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 175-80, 1767-72, 1781-84 (1955); MASS. GEN. LAWS ch. 106, § 1-105, notes (1958).

the limited definitions of documents subject to the UWRA and UBLA.²⁹ If a bill of lading is issued by a contract carrier it is not subject to the UBLA.³⁰ Delivery orders are documents of title under the definition contained in the USA,³¹ but that act deals only with the transfer or negotiation of documents.

This is changed by the Code. All documents of title are subject to the provisions of article 7. "Documents of title" include bills of lading, warehouse receipts, dock warrants, dock receipts, delivery orders and any *other* document "which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers."³² The definition is very broad; drawn from the USA,³³ it permits incorporation of subsequently-developed documents serving the same purpose as those now in use.³⁴

II. DEFINITION AND FORM OF DOCUMENTS OF TITLE

A. *Requirements for All Documents*

All documents of title within the scope of article 7 must purport to be issued or addressed to a bailee and to cover goods in the bailee's possession which are either identified or fungible portions of an identified mass.³⁵ A bailee is defined as a person who acknowledges possession of goods and contracts to deliver them.³⁶ The alternatives "issued or addressed" are necessary to cover docu-

²⁹ Only bills of lading issued by a common carrier are governed by the Uniform Bills of Lading Act. MICH. COMP. LAWS § 482.1 (1948), MICH. STAT. ANN. § 22.1121 (1937). There is no express limitation in the Uniform Warehouse Receipts Act, but it does not purport to apply to any document but a warehouse receipt. See the definitions of warehouse receipt and warehouseman contained in MICH. COMP. LAWS § 443.57 (1948), MICH. STAT. ANN. § 19.477 (1959).

³⁰ A common carrier is one which undertakes to transport personal property for all who may choose to employ him and is engaged in rendering a public service. Michigan Pub. Util. Comm'n v. Krol, 245 Mich. 297, 222 N.W. 718 (1929). See also, *In re Border Cities Trucking Co.*, 261 Mich. 385, 246 N.W. 184 (1933); *In re Columbian Storage & Transfer Co.*, 261 Mich. 390, 246 N.W. 185 (1933); Comment, 36 MICH. L. REV. 802 (1938).

³¹ MICH. COMP. LAWS § 440.76 (1) (1948), MICH. STAT. ANN. § 19.316 (1) (1959).

³² UNIFORM COMMERCIAL CODE § 1-201 (15), referred to by § 7-102 (1) (e).

³³ MICH. COMP. LAWS § 440.76 (1) (1948), MICH. STAT. ANN. § 19.316 (1) (1959).

³⁴ UNIFORM COMMERCIAL CODE § 1-201, comment 15, indicates that a dock warrant is not to be considered a document of title unless so treated by trade usage. This part of the comment does not seem to be supported by the language of § 1-201 (15) since trade usage appears relevant only as to those documents not specifically listed.

³⁵ UNIFORM COMMERCIAL CODE § 1-201 (15). Compare the definition of document of title contained in UNIFORM SALES ACT, § 76 (1), MICH. COMP. LAWS § 440.76 (1) (1948), MICH. STAT. ANN. § 19.316 (1) (1959).

³⁶ UNIFORM COMMERCIAL CODE § 7-102 (1) (a).

ments originating with a bailee, such as warehouse receipts, and documents originating with a bailor, such as delivery orders.

*B. Special Definitions of Warehouse Receipts,
Bills of Lading, and Delivery Orders*

In addition to conforming to the requirements of section 1-201 (15), under the general definition of a document of title, a warehouse receipt must be issued by a person engaged in the business of storing goods for hire.³⁷ This would change present law since only a person lawfully engaged in storing goods for profit may now issue a receipt subject to the UWRA.³⁸ Thus the Code covers warehouse receipts issued by state operated or co-operative warehouses.³⁹

What happens when a person issues warehouse receipts for his own goods? It was held, prior to enactment of the UWRA in Michigan, that a warehouseman, as defined by a statute then in force, could make a valid pledge of his own goods through the use of warehouse receipts.⁴⁰ The Code does not change this. But if the person issuing a document for his own goods is not within the Code definition of a warehouseman, then the receipt is not a document of title.⁴¹ In such a case the holder of the receipt clearly acquires the issuer's obligation of due care and delivery,⁴² but apparently the other provisions of article 7 are not applicable.⁴³ Moreover, the issuer would not be able to claim a lien for storage under the terms of article 7.⁴⁴ On the other hand, it has been held in Michigan that a person storing goods is not prevented from asserting a lien arising from a contract of storage by the fact that he does not meet the statutory definition of warehouseman,⁴⁵ and the Code does not compel a contrary conclusion.

One exception to this discussion should be noted. Where receipts are issued by an owner who is not a warehouseman they are, under the Code, considered of like effect as warehouse receipts

³⁷ UNIFORM COMMERCIAL CODE §§ 1-201 (45), 7-102 (1) (h), 7-201.

³⁸ MICH. COMP. LAWS §§ 443.1, .57 (1948), MICH. STAT. ANN. §§ 19.421, .477 (1959).

³⁹ UNIFORM COMMERCIAL CODE § 7-201, comment.

⁴⁰ Merchants & Mfrs. Bank v. Hibbard, 48 Mich. 118, 11 N.W. 834 (1882).

⁴¹ UNIFORM COMMERCIAL CODE §§ 1-201 (45), 7-102 (1) (h), -201 (1).

⁴² UNIFORM COMMERCIAL CODE §§ 7-401 (c), (d), 7-203 (liability for non-receipt and misdescription), 7-204 (duty of care).

⁴³ See BRAUCHER, DOCUMENTS OF TITLE 9-10 (1958).

⁴⁴ UNIFORM COMMERCIAL CODE §§ 7-206, -209, -210.

⁴⁵ Schneider v. Dayton, 111 Mich. 396, 69 N.W. 829 (1897). See also 2 WILLISTON, SALES § 407 (a) (1948).

if issued under a statute requiring a bond against withdrawal or a license for issuance, such as in the case of distilled spirits.⁴⁶

Under the Code, a warehouseman may, but is under no obligation to, issue warehouse receipts. This represents no change in Michigan law⁴⁷ as found in the UWRA. However, another Michigan statute, the Farm Produce Storage Act of 1939, obligates warehousemen subject to its provisions to issue such receipts.⁴⁸ This latter statute would remain in force, since state regulatory statutes are preserved insofar as they do not affect obligations imposed by the Code.⁴⁹

A bill of lading is newly defined by the Code to be a "document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill."⁵⁰ Thus bills of lading issued by contract carriers and freight forwarders are within the statutory definition. The UBLA does not contain a comparable definition, and the act does not apply to contract carriers.⁵¹ Also, a delivery order is specially defined to be a written order to deliver goods, addressed to a person who in the ordinary course of business issues warehouse receipts or bills of lading.⁵²

C. *Destination Bills of Lading*

One of the most noteworthy innovations is the Code's authorization of a destination bill.⁵³ Traditionally, bills of lading have been issued to the shipper at the originating point of shipment. If the shipment is by air from Detroit to Flint it is possible that the goods will reach their destination in only a few hours. Where there is a sale of the goods, shipper may want a cash payment. He may send the package c.o.d. or, alternatively, draw a draft on buyer and transmit it to his collecting agent along with the bill of lading. If he chooses the latter course of action, the goods will probably arrive long before the documents.

⁴⁶ UNIFORM COMMERCIAL CODE § 7-201 (2).

⁴⁷ Compare UNIFORM COMMERCIAL CODE § 7-201 (1) and UNIFORM WAREHOUSE RECEIPTS ACT, § 1, MICH. COMP. LAWS § 443.1 (1948), MICH. STAT. ANN. § 19.421 (1959).

⁴⁸ MICH. COMP. LAWS § 285.69 (1948), MICH. STAT. ANN. § 12.119 (9) (1958).

⁴⁹ UNIFORM COMMERCIAL CODE §§ 7-103, -201, comment, § 10-104; *but cf.* § 10-102 (1).

⁵⁰ UNIFORM COMMERCIAL CODE § 1-201 (6).

⁵¹ UNIFORM BILLS OF LADING ACT § 1, MICH. COMP. LAWS § 482.1 (1948), MICH. STAT. ANN. § 22.1121 (1937).

⁵² UNIFORM COMMERCIAL CODE § 7-102 (1) (d).

⁵³ UNIFORM COMMERCIAL CODE § 7-305.

In order to eliminate possible delay in this situation, the Code permits issuance of a destination bill of lading by the carrier on the request of the consignor or any person entitled to the goods under an already-issued bill of lading. In the latter case the outstanding document must be surrendered. The carrier can issue shipper a receipt in Detroit containing its promise to issue a bill of lading at Flint. While the carrier wires its agent at Flint to issue the destination bill to seller's agent there, seller can wire his agent, presumably a bank in Flint, a draft on buyer. Thus, the transaction can be completed promptly and to the advantage of all parties. This section of the Code, however, is only permissive and not mandatory.⁵⁴

D. *Essential Terms*

At present in Michigan, while neither bills of lading nor warehouse receipts need be in any particular form, they must contain certain terms. Liability is imposed in favor of any person injured by the omission of an essential term from a negotiable bill or warehouse receipt.⁵⁵ The Code would make several changes.

1. Essential terms are listed only for warehouse receipts.⁵⁶ Nothing is said about bills of lading, evident because it was thought that the contents should be determined by state regulatory agencies.⁵⁷

2. Under the UWRA it might be argued that a warehouse receipt not containing an essential term was invalid. The Code makes it clear that despite such an omission the receipt is still a document of title.⁵⁸

⁵⁴ For a discussion of the destination bill antedating the Code, see Comment, 65 HARV. L. REV. 1392 (1952).

⁵⁵ MICH. COMP. LAWS § 482.2 (1948), MICH. STAT. ANN. § 22.1122 (1937); MICH. COMP. LAWS § 443.2 (1948), MICH. STAT. ANN. § 19.422 (1959).

⁵⁶ UNIFORM COMMERCIAL CODE § 7-202 (2). The essential terms parallel those required by UNIFORM WAREHOUSE RECEIPTS ACT § 2, MICH. COMP. LAWS § 443.2 (1948), MICH. STAT. ANN. § 19.422 (1959), except that in the case of a field warehousing receipt the rate of storage and handling charges need not be stated. A statement that the document is a field warehouse receipt, however, is required.

To determine what are essential terms other Michigan statutes should be consulted. Most important is § 9 of the Farm Produce Act of 1939, MICH. COMP. LAWS § 285.69 (1948), MICH. STAT. ANN. § 12.119 (1) (1958), which imposes additional requirements upon receipts subject to its provisions. There must be a statement of the net weight and percentage of dockage together with grade established and a statement as to whether the farm produce is to be commingled or separately stored.

See also the other statutes cited note 8 *supra*, which impose further requirements unless repealed by enactment of the Uniform Warehouse Receipts Act.

⁵⁷ BRAUCHER, DOCUMENTS OF TITLE 12-13 (1958).

⁵⁸ UNIFORM COMMERCIAL CODE §§ 7-202, -401 (a); *cf.* MICH. COMP. LAWS § 443.2 (1948), MICH. STAT. ANN. § 19.422 (1959). For a discussion whether such an argument should be

3. The liability for omission of an essential term, in the case of a warehouse receipt, can be enforced by any person whether the receipt is negotiable or non-negotiable.⁵⁹ At present, except in the case of warehouse receipts for farm produce, only omission from a negotiable receipt creates a statutory liability.⁶⁰ Nothing is said in the Code about liability for omission of an essential term from a bill of lading.⁶¹

E. *Limitations of Liability*

Section 3 of the UBLA, as enacted in Michigan states:⁶²

“A carrier may insert in a bill issued by him any other terms and conditions, provided that such terms and conditions shall not:

- (a) Be contrary to law or public policy; or
- (b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.”

It is further stated that the carrier may escape liability for a variance between the goods and their description in the bill of lading by the use of “said to contain” or “shipper’s load and count” to indicate that carrier is uncertain as to the contents of the packages shipped.⁶³ The UWRA contains corresponding provisions.⁶⁴

The question then arises whether the bailee may disclaim responsibility for the goods under any other circumstances. *Frohlich v. Pennsylvania Co.*,⁶⁵ a Michigan case decided before adoption of the UBLA, furnishes a typical set of facts. In that case, the con-

accepted, see BRAUCHER, DOCUMENTS OF TITLE 11 (1958); 2 WILLISTON, SALES § 407 (a) (1948); *Investment Serv. Co. v. O'Brien*, 190 Ore. 394, 233 P.2d 163 (1950).

⁵⁹ UNIFORM COMMERCIAL CODE § 7-202 (2).

⁶⁰ MICH. COMP. LAWS § 482.2 (1948), MICH. STAT. ANN. § 22.1122 (1937); MICH. COMP. LAWS § 443.2 (1948), MICH. STAT. ANN. § 19.422 (1959). In the case of farm produce warehouse receipts, liability is extended to omissions from non-negotiable receipts. MICH. COMP. LAWS § 285.69 (j) (1948), MICH. STAT. ANN. § 12.119 (9) (j) (1958).

⁶¹ There is not, however, a negative implication that there would be no liabilities for omission from a bill of lading of an essential term under regulations of a state railroad commission or like body. See UNIFORM COMMERCIAL CODE §§ 7-103, -105.

⁶² MICH. COMP. LAWS § 482.3 (1948), MICH. STAT. ANN. § 22.1123 (1937).

⁶³ UNIFORM BILLS OF LADING ACT § 23, MICH. COMP. LAWS § 482.23 (1948), MICH. STAT. ANN. § 22.1143 (1937).

⁶⁴ UNIFORM WAREHOUSE RECEIPTS ACT §§ 3, 20, MICH. COMP. LAWS §§ 443.3, .20 (1948), MICH. STAT. ANN. §§ 19.423, .440 (1959).

⁶⁵ 138 Mich. 116, 101 N.W. 223 (1904).

signor, acting as agent for the consignee, selected a freight car thought to be suitable for shipment of some mirrors. The carrier had furnished several cars in order that the consignor might choose one, and it apparently was agreed that the carrier should not be liable if the car proved to be unsatisfactory. The car selected was not fit for the use intended and the court held that in accordance with the agreement the carrier would not be liable for the ensuing damage unless the defect was not discoverable through inspection. In another case⁶⁶ it was held that a bill of lading proviso—"box car loaded with perishable freight at shipper's request and shipper's risk"—was not invalidated by the quoted section of the UBLA where the shipper accepted an uninsulated box car as an alternative to waiting for a suitable car.

A statement that the car was inspected by the shipper will not relieve the carrier from liability if the shipper has no choice.⁶⁷ These three cases indicate that the carrier cannot disclaim liability for risks of carriage unless it is asked to take an unusual risk and does not have available the right car for the shipment. In this case it may ask the shipper to delay shipment or assume the risk himself.

There is a somewhat similar case involving warehouse receipts. In *Purse v. Detroit Harbor Terminals*⁶⁸ potatoes were warehoused in general storage. The warehouseman sought to disclaim all liability for loss due to changes in temperature by stating that it would not guarantee any specific temperature except on goods placed in cold storage. There was no proof that the depositor knew that the goods were going to be placed in general storage and the warehouseman was held liable for damage caused by a change in temperature. Presumably, if the warehouseman had no cold storage place and the customer had chosen general storage after full knowledge of the risks, the result might have been different and in accord with the *Frolich* case.

The Attorney General has approved stipulations in bills of lading requiring proof of loss within a certain time⁶⁹ and absolving the carrier from liability after delivery on the ground at a non-station or non-agent point of destination.⁷⁰

⁶⁶ *Lardie v. Manistee & N.E.R.R.*, 192 Mich. 77, 158 N.W. 31 (1916) (alternative holding).

⁶⁷ *Ginsberg v. Wabash Ry. Co.*, 219 Mich. 665, 189 N.W. 1018 (1922) (Federal Bills of Lading Act liability, but court discusses Michigan rule).

⁶⁸ 266 Mich. 92, 253 N.W. 228 (1934).

⁶⁹ [1914] MICH. ATT'Y GEN. REP. 439.

⁷⁰ [1915] MICH. ATT'Y GEN. REP. 387.

From this discussion it can be seen that certain stipulations relieving the bailee from liability have been accorded approval in this state despite the cited sections of the UWRA and UBLA. The Code does not make any substantial changes in this area and its provisions are in harmony with existing Michigan precedents. As before, the warehouseman and carrier may not disclaim their obligations of care and delivery, but statements such as "said to contain" and "shipper's load and count" are permitted.⁷¹ Only in the case of warehouse receipts must such language be conspicuous.⁷² Both warehousemen and carriers may insert conditions pertaining to the procedure and time limits for making claims⁷³ and may limit liability to a declared valuation if the depositor or shipper is given the opportunity to secure full protection by declaring and paying for a higher valuation.⁷⁴ On the other hand, neither the warehouseman nor the carrier may disclaim liability for issuance of documents of title by its agent without receipt of the goods if the agent is actually or apparently authorized,⁷⁵ nor may there be a disclaimer of liability for conversion of the goods by the bailee.⁷⁶ The changed wording of the Code does not appear to contradict the principles set forth in the Michigan decisions and opinions of the Attorney General.

F. *State Regulation*

Reference has already been made to section 10-104, which leaves in effect state regulatory statutes but states that violation of them does not affect the status of a document of title under article 7.⁷⁷ An example of such regulation is found in the statutory authority given the Liquor Control Commission to control the sale or transfer of liquor warehouse receipts within Michigan.⁷⁸ The Commission has issued a regulation circumscribing permissible dealings in such documents.⁷⁹ The argument that violation of a

⁷¹ UNIFORM COMMERCIAL CODE §§ 7-203, -301 (1).

⁷² UNIFORM COMMERCIAL CODE §§ 7-203, 1-201 (10); *cf.* § 7-301 (1).

⁷³ UNIFORM COMMERCIAL CODE §§ 7-204 (3), -309 (3).

⁷⁴ UNIFORM COMMERCIAL CODE §§ 7-204 (2), -309 (2).

⁷⁵ UNIFORM COMMERCIAL CODE §§ 7-102 (1) (g), -203, -301 (1).

⁷⁶ UNIFORM COMMERCIAL CODE §§ 7-204 (2), -309 (2).

⁷⁷ See text accompanying notes 14-17 *supra*.

⁷⁸ MICH. COMP. LAWS §§ 436.32, .58 (1948), MICH. STAT. ANN. §§ 18.1003, .1029 (1957).

⁷⁹ MICH. ADM. CODE R 436.436 F (1954). See also [1935-1936] MICH. ATT'Y GEN. BIENNIAL REP. 385.

regulation such as this can prevent a purchaser from acquiring title to property represented by documents is rejected by the Code.⁸⁰

G. *Negotiable and Non-Negotiable Documents*

Where the document of title permits delivery of goods to bearer or to the order of a named person, the document is negotiable.⁸¹ This represents no change in Michigan law⁸² except that the Code would recognize the existence of a bill of lading payable to "bearer." Such a document is not provided for by the present statute.⁸³

On the other hand, a substantial change is made by according negotiability to a document where it is so treated in overseas trade if it runs to a named person or assigns.⁸⁴ Thus, in a limited area, trade practices can confer negotiability upon a document of title not otherwise possessing this attribute. "Overseas trade" is defined in section 2-323 (3):

"A shipment by water or air or a contract contemplating such shipment is 'overseas' insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce."

Absent federal enactment of the Code, this new provision would be important only in the case of a bill of lading from a foreign point of origin to a Michigan destination; outbound bills are covered by the Federal Bills of Lading Act. Then, if the conflicts rules already discussed were invoked, the Code would be applicable.⁸⁵

All other documents of title are non-negotiable.⁸⁶ The present requirement that non-negotiable bills of lading and warehouse receipts be so marked is omitted.⁸⁷

⁸⁰ Cf. *Star Transfer Line v. General Exporting Co.*, 308 Mich. 86, 13 N.W.2d 217 (1944), in which the Michigan Supreme Court refused to deny claimant's title to whiskey although claimant allegedly had not complied with applicable federal and state regulations.

⁸¹ UNIFORM COMMERCIAL CODE § 7-104 (1).

⁸² UNIFORM BILLS OF LADING ACT §§ 2, 4, 5, 53 (1), MICH. COMP. LAWS §§ 482.2, .4, .5, .53 (1) (1948); MICH. STAT. ANN. §§ 22.1122, .1124, .1125, .1173 (1) (1948); UNIFORM WAREHOUSE RECEIPTS ACT §§ 2, 4, 5, 57, MICH. COMP. LAWS §§ 443.2, .4, .5, .57 (1958), MICH. STAT. ANN. §§ 19.422, .424, .425, .477 (1959); UNIFORM SALES ACT §§ 27, 76, MICH. COMP. LAWS §§ 440.27, .76 (1948), MICH. STAT. ANN. §§ 19.267, .316 (1959).

⁸³ UNIFORM BILLS OF LADING ACT § 5, MICH. COMP. LAWS § 482.5 (1948), MICH. STAT. ANN. § 22.1125 (1937).

⁸⁴ UNIFORM COMMERCIAL CODE § 7-104 (1) (b).

⁸⁵ See text accompanying notes 19-28 *supra*.

⁸⁶ UNIFORM COMMERCIAL CODE § 7-104 (2).

⁸⁷ UNIFORM BILLS OF LADING ACT § 8, MICH. COMP. LAWS § 482.8 (1948), MICH. STAT. ANN. § 22.1128 (1937); UNIFORM WAREHOUSE RECEIPTS ACT § 7, MICH. COMP. LAWS § 443.7 (1948), MICH. STAT. ANN. § 19.427 (1959).

Since the question of the character of the instrument depends upon the manner in which the document states the goods are deliverable, — for example, “to order of Smith,” “to bearer,” “to Smith” — a further statement in a non-negotiable bill of lading — “deliverable on proper indorsement and surrender of this receipt” — will not make it negotiable. This language is to be regarded only as insistence by the bailee on a certain type of receipt.⁸⁸

III. THE CONCEPT OF DUE NEGOTIATION

Title to goods in possession of a third person may be transferred from seller to buyer through a normal sale of the goods. Documents of title, however, provide a more convenient means for transferring title, permitting the parties to deal only with the documents while leaving possession of the goods unchanged. Two classes of documents, negotiable and non-negotiable, have been developed. A purchaser of the first type may be in a position to assert better title than his transferor. If he has purchased a negotiable document in the proper manner he can cut off some prior rights to the goods and the document. The definition of a negotiable document has already discussed. In this section the concept of good faith purchase, as applied to negotiable documents, is examined. The following section compares the rights acquired by purchase of both negotiable and non-negotiable documents.

A. *The Formal Requirements of Negotiation*

The purchaser of a negotiable document of title acquires his preferred position only if the document has been duly negotiated to him. This requires that it be in such condition that it may either be negotiated by delivery or by indorsement. Delivery of the document will operate as a negotiation when no further indorsements are required to pass title. Thus a document stating that the goods will be delivered to “the order of bearer” or that the goods will be delivered to “the order of X” and containing X’s indorsement in blank — for example, “X” or “deliver to bearer, X” — may be negotiated by delivery.⁸⁹

These examples are not changed by the Code⁹⁰ but a further provision has been added to the effect that where a document

⁸⁸ UNIFORM COMMERCIAL CODE § 7-104 and comment.

⁸⁹ UNIFORM SALES ACT § 28, MICH. COMP. LAWS § 440.28 (1948), MICH. STAT. ANN. § 19.268 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 37, MICH. COMP. LAWS § 443.37 (1948), MICH. STAT. ANN. § 19.457 (1959); UNIFORM BILLS OF LADING ACT § 28, MICH. COMP. LAWS § 482.28 (1948), MICH. STAT. ANN. § 22.1148 (1937).

⁹⁰ UNIFORM COMMERCIAL CODE § 7-501 (1), (2).

states that the goods will be delivered to the order of a named person delivery of the document to him has the same effect as negotiation.⁹¹

Under present law, where the document is not in one of the conditions just mentioned, negotiation requires not only delivery but the indorsement of the person entitled to the goods under the document. Where there has been negotiation by indorsement to a specific person, any further negotiation depends on his indorsement.⁹² The Code continues this without change⁹³ but, in the last case mentioned, its definition of "holder" makes no mention of the requirement of the indorsement of the special indorsee.⁹⁴

B. *The Concept of "Due Negotiation"*

A second necessary element is the requirement of due negotiation. If the document can be negotiated by delivery or indorsement, the purchaser must also take it in good faith. Although nowhere specifically defined in the current statutes, due negotiation means the payment of value in good faith and without notice of any prior claims to the document or the goods.⁹⁵

The Code also uses the phrase "due negotiation," but the import of those words is radically different. Thus it is stated:

"A negotiable document of title is 'duly negotiated' when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation."⁹⁶

⁹¹ UNIFORM COMMERCIAL CODE § 7-501 (2) (a). This does not mean that such a person can claim better title than his transferor. There is still the requirement of due negotiation, discussed in part III-B *infra*.

⁹² UNIFORM SALES ACT § 29, MICH. COMP. LAWS § 440.29 (1948), MICH. STAT. ANN. § 19.269 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 38, MICH. COMP. LAWS § 443.38 (1948), MICH. STAT. ANN. § 19.458 (1959); UNIFORM BILLS OF LADING ACT § 29, MICH. COMP. LAWS § 482.29 (1948), MICH. STAT. ANN. § 22.1149 (1937).

⁹³ UNIFORM COMMERCIAL CODE § 7-501 (1), (3).

⁹⁴ "Holder" means a person who is in possession of a document of title . . . drawn, issued or indorsed to him or to his order or to bearer or in blank." UNIFORM COMMERCIAL CODE § 1-201 (20).

⁹⁵ UNIFORM SALES ACT §§ 32, 38, MICH. COMP. LAWS § 440.32, .38 (1948), MICH. STAT. ANN. §§ 19.272, .278 (1959); UNIFORM WAREHOUSE RECEIPTS ACT §§ 41, 47, MICH. COMP. LAWS §§ 443.41, .47 (1948), MICH. STAT. ANN. §§ 19.461, .467 (1959); UNIFORM BILLS OF LADING ACT §§ 32, 38, MICH. COMP. LAWS §§ 482.32, .38 (1948), MICH. STAT. ANN. §§ 22.1152, .1158 (1937).

⁹⁶ UNIFORM COMMERCIAL CODE § 7-501 (4).

The comment to this section indicates that "due negotiation" will not exist where the person attempting to negotiate the document is one with whom it is not customary to deal in the trade. The proponents of the Code state:

" . . . The foundation of the mercantile doctrine of good faith purchase for value has always been . . . the furtherance and protection of the regular course of trade. The reason for allowing a person, in bad faith or in error, to convey away rights which are not his own has from the beginning been to make possible the speedy handling of that great run of commercial transactions which are patently usual and normal.

" . . . No commercial purpose is served by allowing a tramp or professor to 'duly negotiate' an order bill of lading for hides or cotton not his own, and since such a transfer is obviously not in the regular course of business, it is excluded from the scope of the protection of subsection (4)."⁹⁷

Similarly, if the transaction is not customary in the trade then "due negotiation" does not exist.⁹⁸ Protection is also denied where the documents are taken in settlement of a money obligation. The latter rule evidently embodies in the Code the conclusion of its proponents that such a settlement cannot be commercially justified. If this is true, judicial consideration of possible changes in commercial practice is foreclosed.⁹⁹

IV. RIGHTS CONFERRED BY PURCHASE OF DOCUMENTS

Inherent in the purchase of documents of title is the risk that presentment of the document to the bailee will not result in production of the goods or that the goods, if produced, will be subject to the claim of a third person. For instance, the document might be forged or might be issued by a bailee who never received the goods described. In many situations, where presentment of the document is not followed by production of the goods, the purchaser is given one or more causes of action based upon the

⁹⁷ UNIFORM COMMERCIAL CODE § 7-501, comment 1.

⁹⁸ UNIFORM COMMERCIAL CODE § 7-501, comment 1.

⁹⁹ Cf. UNIFORM COMMERCIAL CODE § 1-102(2)(b). Note that § 7-501, comment 1, indicates that a demand for documents as additional security can still fall within the concept of "due negotiation" if the debtor is not then thought to be insolvent. The distinction is thus drawn between the immediate satisfaction of a money obligation by payment in documents and the deferred satisfaction of such an obligation through realization of documents held as collateral.

terms of the document. The discussion which follows considers both title to the goods and possible rights of the purchaser who cannot secure a paramount title.

The possibilities of loss vary with the classification of the purchaser. If the purchase has been in good faith, for value and without notice of any prior claims, both under the Code and at present, three classes of purchasers may exist: the purchaser claiming due negotiation, the purchaser of a non-negotiable document, and the purchaser of a negotiable document who cannot assert due negotiation. This third class is quite unusual.

At present under the uniform acts adopted in Michigan, the purchaser of a negotiable document of title which lacks a necessary indorsement is regarded as a transferee.¹⁰⁰ He may become a holder of the document by securing the missing indorsement. If the missing indorsement is that of his transferor, he is given a right to compel the indorsement but he acquires the better status of a holder through due negotiation only as of the time the indorsement is secured.¹⁰¹ Intervening notice of a prior claim will impair his rights.¹⁰²

Under the Code, in this situation, the purchaser is given the right to compel his transferor's indorsement and his right is expanded in two respects. First, he need not, as at present, have paid value. Regardless of the consideration given he may compel the indorsement although lack of consideration would prevent him from claiming due negotiation. Second, the right to compel indorsement includes the right to demand that his transferor secure indorsements of other necessary parties. If the missing indorsements are supplied, the purchaser can claim due negotiation thereafter.¹⁰³

The Code would create one new situation. In the case of missing indorsements it is possible that the purchaser will acquire them and still not be able to claim due negotiation because due negotiation requires not only that the purchase be in good faith,

¹⁰⁰ UNIFORM SALES ACT §§ 31, 34, MICH. COMP. LAWS §§ 440.31, .34 (1948), MICH. STAT. ANN. §§ 19.271, .274 (1959); UNIFORM WAREHOUSE RECEIPTS ACT §§ 39, 42, MICH. COMP. LAWS §§ 443.39, .42 (1948), MICH. STAT. ANN. §§ 19.459, .462 (1959); UNIFORM BILLS OF LADING ACT §§ 30, 33, MICH. COMP. LAWS §§ 482.30, .33 (1948), MICH. STAT. ANN. §§ 22.1150, .1153 (1937).

¹⁰¹ UNIFORM SALES ACT § 35, MICH. COMP. LAWS § 440.35 (1948), MICH. STAT. ANN. § 19.275 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 43, MICH. COMP. LAWS § 443.43 (1948), MICH. STAT. ANN. § 19.463 (1959); UNIFORM BILLS OF LADING ACT § 34, MICH. COMP. LAWS § 482.34 (1948), MICH. STAT. ANN. § 22.1154 (1937).

¹⁰² *Hale & Co. v. Beley Cotton Co.*, 154 Tenn. 689, 290 S.W. 994 (1926).

¹⁰³ UNIFORM COMMERCIAL CODE § 7-506.

which is defined as honesty in fact,¹⁰⁴ but also requires that it be in the regular course of business or financing and not in the settlement of a money obligation.¹⁰⁵ Thus where the purchaser secures the missing indorsements in good faith but his acquisition of the document was for the purpose of settling a money obligation, he cannot claim due negotiation, a result not currently possible. In examining the risks of purchase under article 7 it is important to distinguish between the three possible classes of purchasers in good faith.

A. *Lack of Title to the Goods or the Documents*

There is always the possibility that the person depositing goods with a bailee or negotiating documents may be doing so against the wishes of the owner of the goods. Under the Code the person to whom documents have been duly negotiated acquires title to the goods and the documents¹⁰⁶ unless the owner neither

“(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this Article (Section 7-403) or with power of disposition under this Act (Sections 2-403 and 9-307) or other statute or rule of law; nor

“(b) acquiesced in the procurement by the bailor, or his nominee of any document of title.”¹⁰⁷

This language is substantially different from that of the present Michigan statutes which simply state that the holder by due negotiation acquires the title which his transferor had or had the ability to convey.¹⁰⁸ The Official Comments indicate that it is intended to give the holder through due negotiation broad protection.¹⁰⁹ Expansion of the purchaser's rights is the result not

¹⁰⁴ UNIFORM COMMERCIAL CODE § 1-201 (19).

¹⁰⁵ UNIFORM COMMERCIAL CODE § 7-501 (4).

¹⁰⁶ UNIFORM COMMERCIAL CODE § 7-502 (1).

¹⁰⁷ UNIFORM COMMERCIAL CODE § 7-503 (1).

¹⁰⁸ UNIFORM SALES ACT § 33, MICH. COMP. LAWS § 440.33 (1948), MICH. STAT. ANN. § 19.273 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 41, MICH. COMP. LAWS § 443.41 (1948), MICH. STAT. ANN. § 19.461 (1959); UNIFORM BILLS OF LADING ACT § 32, MICH. COMP. LAWS § 482.32 (1948), MICH. STAT. ANN. § 22.1152 (1937).

¹⁰⁹ UNIFORM COMMERCIAL CODE § 7-503, comment 1 states, in part:

“In general it may be said that the title of a purchaser by due negotiation prevails over almost any interest in the goods which existed prior to the procurement of the document of title if the possession of the goods by the person obtaining the document derived from any action by the prior claimant which introduced the goods into the stream of commerce or carried them along that stream. A thief of the goods cannot indeed

only of the provisions of article 7, but also of the increased protection given to purchasers under the other Code sections noted in the quotation. Thus under section 2-403 entrusting of goods to a merchant who deals in similar goods gives him the power to pass title to a buyer in the ordinary course of business.¹¹⁰

Purchasers of non-negotiable documents or of negotiable documents without due negotiation receive only the title which their transferor had or had actual authority to convey.¹¹¹ This is substantially less protection than is given a holder through due negotiation and is similar to the current Michigan rule.¹¹² Although the purchaser's position is not enhanced because he has purchased goods through the medium of documents, he is not prevented from relying upon other sections of the Code which would protect him.¹¹³

by shipping or storing them to his own order acquire power to transfer them to a good faith purchaser. Nor can a tenant or mortgagor defeat any rights of a landlord or mortgagee which have been perfected under the local law merely by wrongfully shipping or storing a portion of the crop or other goods. However, 'acquiescence' by the landlord or tenant does not require active consent under subsection (1)(b) and knowledge of the likelihood of storage or shipment with no objection or effort to control it is sufficient to defeat his rights as against one who takes by 'due' negotiation of a negotiable document. . . .

"Persons having an interest in goods also frequently deliver or entrust them to agents or servants other than factors for the purpose of shipping or warehousing or under circumstances reasonably contemplating such action. Rounding out the case law development under the prior Acts, this Act is clear that such persons assume full risk that the agent to whom the goods are so delivered may ship or store in breach of duty, take a document to his own order and then proceed to misappropriate it. This Act makes no distinction between possession or mere custody in such situations and finds no exception in the case of larceny by a bailee or the like. The safeguard in such situations lies in the requirement that a due negotiation can occur only 'in the regular course of business or financing' and that the purchase be in good faith and without notice. See section 7-501. Documents of title have no market among the commercially inexperienced and the commercially experienced do not take them without inquiry from persons known to be truck drivers or petty clerks even though such persons purport to be operating in their own names."

¹¹⁰ UNIFORM COMMERCIAL CODE § 2-403 (2), (3). Sections 7-502 and 7-503 have been the subject of much discussion. For further comments see BRAUCHER, DOCUMENTS OF TITLE 61-65 (1958); NEW YORK LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 1837-48 (1955).

¹¹¹ UNIFORM COMMERCIAL CODE § 7-504 (1).

¹¹² UNIFORM SALES ACT § 34, MICH. COMP. LAWS § 440.34 (1948), MICH. STAT. ANN. § 19.274 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 42, MICH. COMP. LAWS § 443.42 (1948), MICH. STAT. ANN. § 19.462 (1959); UNIFORM BILLS OF LADING ACT § 33, MICH. COMP. LAWS § 482.33 (1948), MICH. STAT. ANN. § 22.1153 (1937).

¹¹³ Assume that *T* entrusted goods to *S* who deposited them in a warehouse, received a non-negotiable receipt for them, and sold the receipt to *P*. If *S* had no actual authority to pass title, *P* acquires no rights in the goods by virtue of UNIFORM COMMERCIAL CODE § 7-504 (1), but he may still win if *S* had the power to pass title under § 2-403. Such a result is indicated by the language of § 7-504, comment 1, which gives as an example the payment by a consignee against a straight bill of lading.

In the case where documents are negotiated by a person acquiring them by fraud, duress, theft, or similar means, the Code continues the rule that the fraudulent acquisition does not impair the validity of the negotiation.¹¹⁴

B. *Duplicate Documents*

Issuance by the bailee of two documents of title purporting to call for delivery of the same goods, whether the bailee is acting with fraudulent intent or not, is obviously a dangerous practice. The UBLA and UWRA proscribe this practice unless the second document is marked as a duplicate.¹¹⁵ No attempt is made to state specifically whether the second document can confer any right in the goods.

The Code sections dealing with overissue are much more detailed. Section 7-402 provides:

“Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.”

The liability imposed by this section is broader than under either the UWRA or UBLA, which acts create a cause of action only in favor of a purchaser for value of a negotiable document.¹¹⁶

The first exception to this section pertains to bills of lading issued in a set. The custom of carriers to issue bills in a set seems to have arisen because of the fear that one bill of lading con-

¹¹⁴ UNIFORM COMMERCIAL CODE § 7-502(2). Cf. UNIFORM SALES ACT § 38, MICH. COMP. LAWS § 440.38 (1948), MICH. STAT. ANN. § 19.278 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 47, MICH. COMP. LAWS § 443.47 (1948), MICH. STAT. ANN. § 19.467 (1959); UNIFORM BILLS OF LADING ACT § 38, MICH. COMP. LAWS § 482.38 (1948), MICH. STAT. ANN. § 22.1158 (1937).

¹¹⁵ UNIFORM BILLS OF LADING ACT § 7, MICH. COMP. LAWS § 482.7 (1948), MICH. STAT. ANN. § 22.1127 (1937); UNIFORM WAREHOUSE RECEIPTS ACT § 6, MICH. COMP. LAWS § 443.6 (1948), MICH. STAT. ANN. § 19.426 (1959).

¹¹⁶ See the statutes cited in note 114 *supra*. UNIFORM COMMERCIAL CODE § 7-402, comment 2, notes that this section creates a cause of action against the issuer even if the purchaser's transferor knew that the document was overissued. Thus the purchaser would acquire more than his transferor when purchasing a non-negotiable document.

trolling disposition of the goods might be lost in transit.¹¹⁷ Since each part purports to control the goods, there is a possibility that two parts may be separately negotiated to different persons. The UBLA prohibits issuance of negotiable bills in a set in any place on the North American continent except Alaska and makes the carrier liable for improper issuance to a purchaser for value.¹¹⁸ The Code, rephrasing the prohibition, extends it to non-negotiable documents and prohibits issuance except where customary in overseas transportation.¹¹⁹ The Code adds a statement concerning the effect on title to the goods of a lawfully issued negotiable set. The person to whom the first due negotiation is made acquires title to the goods, but the carrier is protected if it delivers in good faith against any part of the set. Suppose that separate parts of a negotiable bill in a set are duly negotiated to both *X* and *Y*, the negotiation to *X* being prior in time. *X* has title to the goods¹²⁰ and *Y* has a cause of action against his transferor.¹²¹ If *Y* should secure delivery of the goods from the carrier who has no notice of *X*'s superior claim, then *X* has no cause of action against the carrier but may sue *Y* for the goods.¹²²

The special treatment accorded fungible goods constitutes the second exception to the general rule of invalidity of overissued documents. Assume that *X* and *Y* deposit fungible goods with *B*, a warehouseman. *B* commingles the goods. Under the UWRA, *B* is permitted to commingle fungible goods only when authorized by agreement or custom. All other goods must be kept separate.¹²³ The Code would change this by permitting commingling at any time if the goods are fungible. Other goods may be commingled if the receipt so provides.¹²⁴ Both *X* and *Y* take the risk that a

¹¹⁷ Another reason would be to provide several people with documents controlling the same goods. See 2 WILLISTON, SALES § 441 (1948), for a criticism of this practice.

¹¹⁸ UNIFORM BILLS OF LADING ACT § 6, MICH. COMP. LAWS § 482.6 (1948), MICH. STAT. ANN. § 22.1126 (1937).

¹¹⁹ UNIFORM COMMERCIAL CODE § 7-304 (1).

¹²⁰ UNIFORM COMMERCIAL CODE § 7-304 (3).

¹²¹ UNIFORM COMMERCIAL CODE § 7-304 (4).

¹²² UNIFORM COMMERCIAL CODE § 7-304 (3), (5). There is no specific provision determining title to goods for which non-negotiable bills in a set have been issued, but the result would be governed by §§ 7-504 (1), (2) (b). The first purchaser (*X*) would be protected unless the second purchaser (*Y*) was a buyer in the ordinary course of business from the transferor who either first notified the carrier or obtained delivery of the goods.

¹²³ UNIFORM WAREHOUSE RECEIPTS ACT §§ 22, 23, MICH. COMP. LAWS §§ 443.22, .23 (1948), MICH. STAT. ANN. §§ 19.442, .443 (1959). See also MICH. COMP. LAWS § 285.73 (1948), MICH. STAT. ANN. § 12.119 (13) (1958) (commingling of fungible farm produce).

¹²⁴ UNIFORM COMMERCIAL CODE § 7-207 (1).

shortage may develop. The Code follows present law in regarding them as tenants in common who must share the loss equally.¹²⁵ But there is the chance that subsequently the warehouseman may issue a receipt to Z for fungible goods which have not been received. The Code specifically provides that if Z duly negotiates the receipt to A then A shares as a tenant in common with X and Y.¹²⁶ This is one case in which the status of a purchaser through due negotiation (A) is much better than a person who purchases a negotiable document without due negotiation. The latter would not be entitled to share as a tenant in common with X and Y.

The last exception relates to substitute documents. If a document allegedly is lost, stolen, or destroyed, disposition of the goods must be made without the assurance that the person receiving the goods is actually entitled to them. There is always the possibility that the missing document may turn up in the hands of another claimant. The interests of the bailee, the person claiming under the missing document, and the person who may possibly present the missing document at a later date must be reconciled. The Code provides that in the case of a lost, missing, or stolen document a court may order delivery of the goods or the issuance of a substitute document. Protection for a person later presenting the missing document is obtained by requiring the posting of a bond before the duplicate is issued. Posting of a bond is mandatory if a substitute for a negotiable document is requested and within the discretion of the court if the missing document is non-negotiable.¹²⁷ This Code provision is broader than those provided in the present statutes which do not authorize this procedure in the case of either a stolen negotiable or any non-negotiable document.¹²⁸ The bailee is not compelled to seek a court order. He may deliver pursuant to the terms of the missing document, an act of doubtful validity at present,¹²⁹ but he risks being held for improper delivery. He will not be liable for conversion if the delivery was made in good faith.¹³⁰

¹²⁵ UNIFORM WAREHOUSE RECEIPTS ACT § 23, MICH. COMP. LAWS § 443.23 (1948), MICH. STAT. ANN. § 19.443 (1959); cf. UNIFORM COMMERCIAL CODE § 7-207 (2).

¹²⁶ UNIFORM COMMERCIAL CODE § 7-207 (2). For further discussion see BRAUCHER, DOCUMENTS OF TITLE 98-102 (1958).

¹²⁷ UNIFORM COMMERCIAL CODE § 7-601 (1).

¹²⁸ UNIFORM WAREHOUSE RECEIPTS ACT § 14, MICH. COMP. LAWS § 443.14 (1948), MICH. STAT. ANN. § 19.434 (1959); UNIFORM BILLS OF LADING ACT § 17, MICH. COMP. LAWS § 482.17 (1948), MICH. STAT. ANN. § 22.1137 (1937).

¹²⁹ UNIFORM COMMERCIAL CODE § 7-601 (2), and comment 1.

¹³⁰ UNIFORM COMMERCIAL CODE § 7-601 (2).

C. *Disposition of the Goods by the Bailee*

In the case of the deposit of fungible goods by *X* and *Y* with *B*, a warehouseman, there is a further risk that a shortage may develop, not because of overissue of receipts, but because the warehouseman sells some of the fungible goods directly to *A*. Under the UWRA it could be argued that *X* and *Y* retained title to the goods sold and could recover them from *A*.¹³¹ However, the Code adopts the position that *A* should be protected if he is a buyer in the ordinary course of business from *B* and *B* is in the business of dealing in such fungible goods for his own account.¹³² This is consistent with the position taken in article 2 that entrusting of goods to a merchant dealing in them gives the merchant power to pass title to a buyer in the ordinary course of business.¹³³

A related situation occurs when *P* purchases a non-negotiable document from *S*. If *B*, the bailee, in good faith disposes of the goods upon the instructions of *S*, then *P* loses his right to demand delivery from *B*.¹³⁴ Here the risk is that *P* will not be able to hold the bailee liable for non-receipt although he may still be able to claim the goods from *S*.¹³⁵

D. *Alteration or Unauthorized Completion*

Currently, the purchaser of a document of title assumes the risk that the original terms of the document have been altered or that it was issued with one or more terms left blank and these terms were subsequently completed without authority from the issuer. In such a case a purchaser for value may enforce the document only according to its original terms.¹³⁶ This rule as to bills of lading is unchanged by the Code, but as to warehouse receipts it is provided that "a purchaser for value and without notice of the want of authority may treat the insertion as authorized."¹³⁷ An

¹³¹ UNIFORM COMMERCIAL CODE § 7-205, comment.

¹³² UNIFORM COMMERCIAL CODE § 7-205. Such a buyer is defined in § 1-201 (9).

¹³³ UNIFORM COMMERCIAL CODE § 2-403 (2). What result if the goods are not fungible? From the language of § 2-403 (2) alone it would seem applicable to both fungible and non-fungible goods, but under § 7-502 (1) the person to whom a document has been duly negotiated gets title to the goods subject only to a few exceptions, none of which refer to § 2-403.

¹³⁴ UNIFORM COMMERCIAL CODE § 7-504 (2) (c).

¹³⁵ If *S* has disposed of the goods, *A* can be barred from asserting his title against *S*'s vendee if § 7-504 (2) (b) is applicable. See part IV-G *infra*.

¹³⁶ UNIFORM WAREHOUSE RECEIPTS ACT § 13, MICH. COMP. LAWS § 443.13 (1948), MICH. STAT. ANN. § 19.433 (1959); UNIFORM BILLS OF LADING ACT § 16, MICH. COMP. LAWS § 482.16 (1948), MICH. STAT. ANN. § 22.1136 (1937).

¹³⁷ UNIFORM COMMERCIAL CODE § 7-306.

alteration other than such insertion leaves the receipt enforceable as originally issued.¹³⁸

The Official Comment states: "The execution of warehouse receipts in blank is a dangerous practice. As between the issuer and an innocent purchaser the risks should clearly fall on the former."¹³⁹ This comment is most interesting when it is noted that there is no parallel treatment of bills of lading. One writer has suggested¹⁴⁰ that the different treatment is in accordance with commercial practice. Thus warehouse receipts are prepared by the bailee's agent when he actually receives the goods but bills of lading are made out by the shipper and his description of the goods is accepted as correct, giving rise to the term "shipper's load and count." This ignores the difference between the placing of the carrier's signature on a bill for goods already loaded, with a disclaimer of liability for the accuracy of the description, and placing the same signature on a blank bill of lading. The invitation for fraud may prove irresistible in the latter case since it permits sale of the document without the bother of loading anything aboard the carrier.¹⁴¹

The treatment of unauthorized completions is disappointing because it is limited to warehouse receipts and bills of lading. Suppose that a delivery order is issued with some blanks and is purchased before acceptance by the bailee. The Code does not say whether the issuer is under an obligation to obtain acceptance of the delivery order by the bailee in accordance with the unauthorized insertion.¹⁴²

E. *Freight Forwarder Bills of Lading*

D may deliver a small lot of goods to *F*, a transportation company, for the purpose of shipment. He does this because *F* is a freight forwarder who assembles small shipments into carload lots and thus secures the lower rate allowed such shipments.¹⁴³ *F* issues

¹³⁸ UNIFORM COMMERCIAL CODE § 7-208.

¹³⁹ UNIFORM COMMERCIAL CODE § 7-208, comment 1.

¹⁴⁰ Patton, *Warehouse Receipts, Bills of Lading, and Other Documents of Title: A Comparison of the Texas Law and Article Seven of the Uniform Commercial Code*, 31 TEXAS L. REV. 167, 189 (1952).

¹⁴¹ Under the Federal Bills of Lading Act a carrier was held liable where the shipper procured a blank bill of lading before it had loaded the car, and then used the bill to defraud a third person. Since the car had never been loaded with anything, the words "shipper's load and count" would not protect the carrier. *Chicago & N.W. Ry. v. Stephens Nat. Bank*, 75 F.2d 398 (8th Cir. 1935). See also Bailey, *Bills of Lading Under Texas Law*, 17 TEXAS L. REV. 422, 422-31 (1939).

¹⁴² Cf. UNIFORM COMMERCIAL CODE § 7-502(1)(d).

¹⁴³ See BRAUCHER, DOCUMENTS OF TITLE 13-14 (1958); 4 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE 291-93 (1958).

to *D* a negotiable bill of lading and in turn receives a negotiable bill of lading covering many lots, including *D*'s from *O*, the carrier. What happens if *F* and *D* duly negotiate the bills of lading to separate parties? In such a case, the purchaser from *D* acquires title to *D*'s goods¹⁴⁴ on the theory that the bill of lading issued by *O* to *F* will indicate on its face that it is subject to a freight forwarder bill.¹⁴⁵ However, *O* is protected if it delivers in accordance with the terms of its own bill.¹⁴⁶ There is no comparable Michigan statute.

F. *Rights of Transferor's Creditors*

The transferee of a non-negotiable document runs the risk that creditors of the transferor may be successful in reaching the goods in the hands of the bailee.¹⁴⁷ Under current Michigan law any creditor of the transferor may defeat the transferee's title by attachment or execution until such time as the transferee notifies the bailee of the transfer.¹⁴⁸ The Code would restrict this right to only those creditors who could attack the transfer as being fraudulent under the terms of section 2-402.¹⁴⁹

¹⁴⁴ UNIFORM COMMERCIAL CODE § 7-503 (3).

¹⁴⁵ UNIFORM COMMERCIAL CODE § 7-503, comment 3.

¹⁴⁶ UNIFORM COMMERCIAL CODE § 7-503 (3).

¹⁴⁷ UNIFORM COMMERCIAL CODE § 7-504 (2) (a).

¹⁴⁸ UNIFORM SALES ACT § 34, MICH. COMP. LAWS § 440.34 (1948), MICH. STAT. ANN. § 19.274 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 42, MICH. COMP. LAWS § 443.42 (1948), MICH. STAT. ANN. § 19.462 (1959); UNIFORM BILLS OF LADING ACT § 33, MICH. COMP. LAWS § 482.33 (1948), MICH. STAT. ANN. § 22.1153 (1937). Cf. UNIFORM SALES ACT § 26, MICH. COMP. LAWS § 440.26 (1948), MICH. STAT. ANN. § 19.266 (1959).

¹⁴⁹ UNIFORM COMMERCIAL CODE § 2-402 does not set forth the classes of creditors entitled to treat the sale as void but refers to state law outside the Code. An analysis of any possible change in Michigan law under this particular section is not within the scope of this article. However, it should be noted that by statute in Michigan retention of possession by the seller is fraudulent as to all creditors unless the transferee can prove good faith and no intent to defraud. Certain exceptions are made where a bill of sale is filed or where title to the chattel is registered. MICH. COMP. LAWS § 556.137 (1948), MICH. STAT. ANN. § 26.926 (1953). For a further discussion of UNIFORM COMMERCIAL CODE § 2-402, see BRAUCHER, DOCUMENTS OF TITLE 73-75 (1958); HAWKLAND, SALES AND BULK SALES 107-08 (1958).

The rights of creditors under § 2-402 should be distinguished from claims of secured creditors of the seller. Assume that *S* is the owner of goods for which documents of title have been issued. He borrows money from *C* and purports to give *C* a security interest in the goods represented by the documents. He then sells the documents to *P*. *C*'s rights are governed by Article 9 on secured transactions. Where the goods are represented by negotiable documents *C* is required to perfect his security interest in the documents themselves, § 9-304 (2). This may be done by filing, § 9-304 (1), (2), or by taking possession of the document, § 9-305. The latter course is the only safe one since if *P* takes through due negotiation, § 9-309 subordinates *C*'s interest to that of *P*. However, if *P* purchases a negotiable document but without due negotiation, as in the case of settlement of a money obligation, the Code appears to subordinate *P*'s interest to that of *C*. See §§ 7-504 (1), 9-201, 9-309. The purchaser of a non-negotiable document takes subject to the perfected claim of a creditor §§ 7-504 (1), 9-201. *C* may perfect his claim by filing,

G. *Second Sale by the Transferor*

The rights of the transferee of a non-negotiable document also may be defeated by a second sale of the goods by the transferor. Currently, if *P* purchases a non-negotiable document of title from *S* and then *S* sells the goods represented by the document to *T*, *T* secures title to the goods if he first notifies the bailee.¹⁵⁰ This is a specialized version of the rule that a seller retaining possession may pass title to a second bona fide purchaser but in the case of documents the second purchaser can perfect his claims by notification of the bailee rather than by paying value and taking delivery.¹⁵¹ The Code continues this principle.¹⁵²

However, under the Code, not every second sale to *T* will defeat *P*'s title. Protection is given to *T*, at *P*'s expense, only if *T* is a buyer in the ordinary course of business from *S*. *T* will not be protected if he is a bulk buyer or takes the goods as security for, or in satisfaction of, a money obligation.¹⁵³ Thus, *P*'s protection is increased in this case but mainly because of concepts not peculiar to article 7.

H. *Diversion and Reconsignment: Stoppage in Transit*

There are certain hazards for purchasers peculiar to bills of lading. It is possible that where goods are in transit under a straight bill of lading the consignor may decide that he wishes to ship them to a person other than the original consignee. The question then arises whether a purchaser of the non-negotiable bill from the consignee can assert a property right in the goods superior to that

notifying the bailee, or securing issuance of documents in his name. § 9-304(3). If we assume that *P* in our example has purchased non-negotiable documents, and that *C* has filed, *P* will still prevail over *C* if he is a buyer in the ordinary course of business from *S*, except in the case of farm products purchased from a person engaged in farming operations. This is true although *P* knows of the existence of the security interest if he believes that the sale is not in violation of the security agreement. UNIFORM COMMERCIAL CODE § 9-307(1), and comment. One further point: if *P* is other than a buyer in the ordinary course of business and *C*'s security interest is not perfected immediately, *P* will prevail only to the extent that he both gives value and receives delivery of the documents without notice of *C*'s claim and prior to perfection. UNIFORM COMMERCIAL CODE § 9-301(1)(c).

¹⁵⁰ UNIFORM SALES ACT § 34, MICH. COMP. LAWS § 440.34 (1948), MICH. STAT. ANN. § 19.274 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 42, MICH. COMP. LAWS § 443.42 (1948), MICH. STAT. ANN. § 19.462 (1959); UNIFORM BILLS OF LADING ACT § 33, MICH. COMP. LAWS § 482.33 (1948), MICH. STAT. ANN. § 22.1153 (1937).

¹⁵¹ Cf. UNIFORM SALES ACT § 25, MICH. COMP. LAWS § 440.25 (1948), MICH. STAT. ANN. § 19.265 (1959).

¹⁵² UNIFORM COMMERCIAL CODE § 7-504(2)(b).

¹⁵³ UNIFORM COMMERCIAL CODE §§ 1-201(9), 7-504(2)(b).

of the person actually receiving them. There are no Michigan cases or statutes covering this point. Presumably the issue would be determined by whether title had passed to the consignee at the time of diversion.¹⁵⁴ The Code does not spell out the result in all cases, but where the substituted consignee is a buyer in the ordinary course of business from the consignor, he takes free of any claim by the original consignee.¹⁵⁵ This danger is limited to the purchase of non-negotiable bills since only the holder of a negotiable bill may divert.¹⁵⁶

The second possible hazard is the seller's exercise of his right of stoppage in transit. What happens when buyer sells goods in transit to sub-buyer and then seller attempts to exercise his right to stop the goods? In the case of negotiable bills of lading, sub-buyer can protect himself by obtaining the bill since negotiation of the bill to buyer by seller terminate's seller's right to stop.¹⁵⁷

The result in the case of non-negotiable bills of lading is not quite so clear. If the seller has agreed to ship directly to sub-buyer he apparently loses his right to stop upon buyer's insolvency.¹⁵⁸ However, where shipment is made directly to buyer who then diverts to sub-buyer, seller's right to stop seems to exist until receipt of the goods by sub-buyer.¹⁵⁹

I. *Title Based on Unaccepted Delivery Orders*

Suppose that *A*, the owner of certain goods, deposits them with a bailee and receives a document of title. He then issues an order to deliver the goods and sells this order to *Y*. The document issued by *A* is a delivery order and is a document of title under both the Code¹⁶⁰ and the Uniform Sales Act.¹⁶¹ However, the present USA sections on negotiation and transfer of documents of title apply

¹⁵⁴ Cf. UNIFORM COMMERCIAL CODE § 7-504, comment; *Proctor & Gamble Co. v. Peters, White & Co.*, 233 N.Y. 97, 134 N.E. 849 (1922).

¹⁵⁵ UNIFORM COMMERCIAL CODE § 7-504 (3).

¹⁵⁶ UNIFORM COMMERCIAL CODE § 7-303 (1) (a).

¹⁵⁷ UNIFORM COMMERCIAL CODE § 2-705 (2) (d).

¹⁵⁸ UNIFORM COMMERCIAL CODE § 2-705, comment 2.

¹⁵⁹ UNIFORM COMMERCIAL CODE § 2-705 (2) (a), and comment 2. The seller's right of stoppage is also defeated by reshipment by the carrier on the buyer's instruction, § 2-705 (2) (c), but comment 3 to this section indicates that diversion at the order of the buyer is not reshipment if it is an incident to the original contract of carriage. UNIFORM COMMERCIAL CODE § 2-705 is a revision of UNIFORM SALES ACT §§ 57-59, MICH. COMP. LAWS §§ 440.57-60 (1948), MICH. STAT. ANN. §§ 19.297-300 (1959). See also UNIFORM WAREHOUSE RECEIPTS ACT §§ 9, 11, 49, MICH. COMP. LAWS §§ 443.9, .11, .49 (1948), MICH. STAT. ANN. §§ 19.429, 431, 469 (1959). For further comment, see BRAUCHER, DOCUMENTS OF TITLE 78-80 (1958); HAWKLAND, SALES AND BULK SALES 146-94 (1958).

¹⁶⁰ UNIFORM COMMERCIAL CODE § 1-201 (15).

¹⁶¹ UNIFORM SALES ACT § 76 (1), MICH. COMP. LAWS § 440.76 (1) (1948), MICH. STAT. ANN. § 19.316 (1) (1959).

only after the delivery order has been accepted by the bailee.¹⁶² An innovation in the Code is the attempt to specify the title consequences of dealings in unaccepted delivery orders.

Possible problems when dealing with unaccepted delivery orders can be divided into three general categories: (1) Where *A* issues a delivery order covering goods for which there already is a document outstanding as in the case above, (2) where *A* issues two delivery orders covering the same goods, and (3) where *X* a stranger to *A*'s title issues a delivery order.

Case 1 is not a case of overissue covered by section 7-402 since the two documents outstanding are not those of the same issuer.¹⁶³ The Code, however, specifically provides that title based upon an unaccepted delivery order, whether it is negotiable or not, is subject to the rights of any person to whom a negotiable warehouse receipt or bill of lading has been duly negotiated.¹⁶⁴ If the receipt or bill of lading outstanding is not negotiable or is not duly negotiated, the person acquiring it, if a buyer in the ordinary course of business from *A*, may still defeat *Y*'s rights by first notifying the bailee or receiving the goods.¹⁶⁵

Case 2 is a case of overissue and the general rule of invalidity of the second document apparently applies.¹⁶⁶ But again the rights under the first delivery order, although it is negotiable, can be defeated in the same manner as those under a non-negotiable document.¹⁶⁷

If, as in case 3, the delivery order is issued and sold by a person having no rights in the goods, and if it is negotiable, the purchaser will not receive good title unless the other claimant acquiesced in its procurement.¹⁶⁸ If it is non-negotiable, the purchaser will take nothing.¹⁶⁹

V. LIABILITIES INCURRED BY NEGOTIATION OR TRANSFER OF DOCUMENTS

Section 7-505 provides that the indorsement of a document of

¹⁶² A negotiable document of title under the Uniform Sales Act is one in which it is stated that the goods will be delivered to bearer. An unaccepted delivery order would not contain this statement. See UNIFORM SALES ACT § 27, MICH. COMP. LAWS § 440.27 (1948), MICH. STAT. ANN. § 19.267 (1959).

¹⁶³ UNIFORM COMMERCIAL CODE § 7-402, comment 3.

¹⁶⁴ UNIFORM COMMERCIAL CODE § 7-503 (2).

¹⁶⁵ UNIFORM COMMERCIAL CODE §§ 7-503 (2), -504 (2) (b).

¹⁶⁶ UNIFORM COMMERCIAL CODE § 7-402. The specialized treatment of overissue in the case of fungible goods contained in § 7-207 (2) will not apply because the warehouseman has not issued any documents.

¹⁶⁷ UNIFORM COMMERCIAL CODE § 7-504 (2).

¹⁶⁸ UNIFORM COMMERCIAL CODE § 7-503 (1).

¹⁶⁹ UNIFORM COMMERCIAL CODE § 7-504 (1).

title does not make the indorser liable for the default of either the bailee or any previous indorsers. This is in accord with present Michigan law.¹⁷⁰ However, if the document is a negotiable delivery order which is duly negotiated, the issuer and any indorsers have the obligation to procure the bailee's acceptance.¹⁷¹ This latter provision is new. As noted earlier, the transferee of a negotiable document has a right to compel his transferor to secure any necessary indorsements.¹⁷²

In the case of delivery orders the Code makes it clear that the holder through due negotiation does not acquire the obligation of the bailee to deliver until after acceptance of the document. Does acceptance by a bailee of a delivery order have any effect on the obligations of the issuer? Suppose that a delivery order is issued by *A* to *B* directing warehouseman, *W*, to deliver non-existent goods to the order of *B*. *B* then duly negotiates the unaccepted delivery order to *C* who presents it to *W* for acceptance. If *W* refuses to accept or deliver, *A* is liable to *C* for damages caused by non-receipt of the goods under section 7-203 because *A* is the issuer of an unaccepted delivery order.¹⁷³ But what happens if *W* accepts? It is clear that *W* will be liable for non-receipt, but will *A*? Since section 7-203 imposes liability upon only the issuer and since the implication of the definition of issuer is that *A* falls within its terms only while the delivery order is unaccepted it would seem that *A* is no longer liable for non-receipt. A more logical possibility is that the liability for non-receipt imposed upon *A* in favor of *C* is not destroyed upon subsequent acceptance by *W* but that if *C* duly negotiated to *D* after acceptance, *D* would be able to hold only *W* liable for non-receipt, since *A* is an issuer as to *C* but not as to *D*.

Where a document of title is sold the seller gives certain warranties. Under the present uniform acts they are that the document is genuine, that the seller has a legal right to sell the document, and that the seller has no knowledge of facts impairing its validity. In addition the seller also warrants title to the goods,

¹⁷⁰ UNIFORM SALES ACT § 37, MICH. COMP. LAWS § 440.37 (1948), MICH. STAT. ANN. § 19.277 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 45, MICH. COMP. LAWS § 443.45 (1948), MICH. STAT. ANN. § 19.465 (1959); UNIFORM BILLS OF LADING ACT § 36, MICH. COMP. LAWS § 482.36 (1948), MICH. STAT. ANN. § 22.1156 (1937). In *Maybee v. Tregent*, 47 Mich. 495, 11 N.W. 287 (1882), a case antedating adoption of the Uniform Bills of Lading Act, suit was brought against the seller of goods for non-delivery on the theory that by indorsing the bill of lading the seller became liable on the document. The court rejected this theory, but noted that plaintiff could still sue for breach of the underlying contract.

¹⁷¹ UNIFORM COMMERCIAL CODE § 7-502 (1) (d).

¹⁷² UNIFORM COMMERCIAL CODE § 7-506. See part IV *supra*.

¹⁷³ UNIFORM COMMERCIAL CODE § 7-102 (1) (g).

merchantable quality, and fitness for a special purpose where such warranties would be implied if the goods were sold without use of the documents.¹⁷⁴ The Code continues the warranties as to the documents but omits specific provision for the implied sales warranties on the theory that those warranties will exist in any case since they are derived from the underlying contract of sale.¹⁷⁵

Under the present statutes there is a question whether these warranties of the seller concerning the documents extend to remote purchasers.¹⁷⁶ The Code removes this question by stating that unless otherwise agreed the given warranties run only to the immediate purchaser.¹⁷⁷

It often happens that a seller will ship goods to a buyer and then forward through a bank, or other agent for collection, the bills of lading and a draft drawn on the buyer. When buyer pays or accepts the draft he will be given the bills of lading. By the use of an appropriate form of a bill of lading seller will thus be able to retain a security interest in the goods until paid.¹⁷⁸ Sometimes the bank will advance seller funds when it takes the draft for collection. The Code follows present law in stating that the collecting bank does not assume warranty liability to the buyer when presenting the draft for collection. The Code appears to change present law by stating affirmatively that the intermediary warrants its own good faith and authority.¹⁷⁹ However, the Code does not foreclose warranty liability for the bank or other intermediary if it is acting as agent for the seller or has assumed the seller's obligations.¹⁸⁰

An interesting Michigan decision in this area is *Wettlaufer Mfg. Corp. v. Detroit Bank*.¹⁸¹ Plaintiff was a customer at defendant bank and, wishing to purchase some steel, arranged for presentment to his bank of a draft drawn on him with a bill of lading

¹⁷⁴ UNIFORM SALES ACT § 36, MICH. COMP. LAWS § 440.36 (1948), MICH. STAT. ANN. § 19.276 (1959); UNIFORM WAREHOUSE RECEIPTS ACT § 44, MICH. COMP. LAWS § 443.44 (1948), MICH. STAT. ANN. § 19.464 (1959); UNIFORM BILLS OF LADING ACT § 35, MICH. COMP. LAWS § 482.35 (1948), MICH. STAT. ANN. § 22.1155 (1937).

¹⁷⁵ UNIFORM COMMERCIAL CODE § 7-507, comment 1.

¹⁷⁶ In the statutes cited in note 174 *supra* there is no mention of who may enforce the warranties.

¹⁷⁷ UNIFORM COMMERCIAL CODE § 7-507. Under this section the parties may also agree that there are to be no warranties. The treatment of warranties as to documents of title is somewhat different from that accorded those accompanying negotiable instruments. In the latter case use of the indorsement "without recourse" is restricted, § 3-417 (3), and warranties extend to subsequent holders in good faith under § 3-417 (2).

¹⁷⁸ See UNIFORM COMMERCIAL CODE § 2-505.

¹⁷⁹ UNIFORM COMMERCIAL CODE § 7-508. Cf. UNIFORM BILLS OF LADING ACT § 37, MICH. COMP. LAWS § 482.37 (1948), MICH. STAT. ANN. § 22.1157 (1937); UNIFORM WAREHOUSE RECEIPTS ACT § 46, MICH. COMP. LAWS § 443.46 (1948), MICH. STAT. ANN. § 19.466 (1959).

¹⁸⁰ See 2 WILLISTON, SALES § 435 (1948).

¹⁸¹ 324 Mich. 684, 37 N.W.2d 674 (1949).

attached. When the bill of lading and draft arrived, defendant's teller telephoned this fact to plaintiff and also stated that the documents were straight bills of lading showing that a certain amount of steel had been shipped. Plaintiff then authorized a charge against his account in the amount of the draft. Upon subsequent examination of the bills, plaintiff discovered that they were not signed by any carrier and were in fact fraudulent. The Michigan Supreme Court held that the teller's statement was a material misrepresentation of fact giving plaintiff a cause of action for fraud. The result in this case would not be different under the Code because plaintiff's theory was not based upon the existence of any warranty.¹⁸²

VI. THE BAILEE'S DUTY OF CARE

A. *Carriers*

Section 7-309 (1) defines the duty of care imposed upon a carrier.

"A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence."

This section is a revision of section 3 of the UBLA¹⁸³ and leaves in force present Michigan statutes and decisions defining the liability of a common carrier. The extent of this liability is explored elsewhere¹⁸⁴ and need not be detailed here except to note that by statute the carrier is made liable for loss caused by agencies beyond its control where the negligence of the carrier contributes to the loss.¹⁸⁵ The balance of section 7-309 permits the carrier to limit the time for making claims and limit its liability if the actual value of the goods is not declared.¹⁸⁶

¹⁸² Liabilities involved in presentment of documents for payment under letters of credit should also be noted. See UNIFORM COMMERCIAL CODE §§ 5-111, -114.

¹⁸³ MICH. COMP. LAWS § 482.3 (1948), MICH. STAT. ANN. § 22.1123 (1937).

¹⁸⁴ See 4 CALLAGHAN'S MICHIGAN CIVIL JURISPRUDENCE 233-73 (1958).

¹⁸⁵ MICH. COMP. LAWS § 469.501 (1948), MICH. STAT. ANN. § 22.1191 (1937). Cf. *Ithaca Roller Mills v. Ann Arbor R.R.*, 217 Mich. 348, 186 N.W. 516 (1922) (applying federal law).

¹⁸⁶ For a discussion of the validity of such limitations and the changes the Code would make in present Michigan law, see part II-E *supra*.

The Code also establishes liability of originating and connecting carriers when a through bill of lading is issued. If there is a breach of duty on the part of any carrier, the originating carrier is liable and the connecting carrier is liable for a breach of duty while the goods are in its possession. When the originating carrier is held liable for the default of a connecting carrier it is given a right over against the ultimate wrongdoer.¹⁸⁷ The comment states that this section imposes no obligation to issue a through bill of lading.¹⁸⁸

Although there is no prior uniform statutory treatment of this subject, there is a Michigan statute which imposes liability upon the originating carrier for loss caused by connecting carriers. The originating carrier is also given a right over against the connecting carrier.¹⁸⁹

B. Warehousemen

Section 7-204 (1) of the Code provides:

"A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care."¹⁹⁰

This is a revision of section 21 of the UWRA¹⁹¹ and would not change existing Michigan law.¹⁹² As in the case of bills of lading, certain limitations of liability are permitted.¹⁹³

The Code does not attempt to state when the carrier's liability as a common carrier ceases and becomes that of a warehouseman. The Michigan Supreme Court has stated that the carrier is held to a warehouseman's standard of care only after it has given notice

¹⁸⁷ UNIFORM COMMERCIAL CODE § 7-302.

¹⁸⁸ UNIFORM COMMERCIAL CODE § 7-302, comment 1.

¹⁸⁹ MICH. COMP. LAWS § 462.7 (e) (1948), MICH. STAT. ANN. § 22.26 (e) (1937).

¹⁹⁰ UNIFORM COMMERCIAL CODE § 7-204 (1).

¹⁹¹ MICH. COMP. LAWS § 443.21 (1948), MICH. STAT. ANN. § 19.441 (1959). See also MICH. COMP. LAWS § 444.25 (1948), MICH. STAT. ANN. § 19.515 (1959).

¹⁹² *Berry v. Cadillac Storage Co.*, 259 Mich. 104, 242 N.W. 855 (1932); *Purse v. Detroit Harbor Terminals, Inc.*, 266 Mich. 92, 253 N.W. 228 (1934) (reasonable care dependent on nature of goods and weather conditions); *Price & Pierce, Ltd. v. Jarka Great Lakes Corp.*, 37 F. Supp. 939 (W.D. Mich. 1941). Cf. *Hudson v. Columbian Transfer Co.*, 137 Mich. 255, 100 N.W. 402 (1904), in which the goods were warehoused in a building other than the one contemplated by the contract of storage. The goods were destroyed by fire and the depositor's insurance did not cover the loss because of the change in place of storage. It was held that the warehouseman was liable for breach of contract and implied that due care on the part of the warehouseman would be no defense.

¹⁹³ UNIFORM COMMERCIAL CODE § 7-204 (2) (3). See part II-E *supra*.

of the goods' arrival at destination and the consignee has had a reasonable time for claim and removal.¹⁹⁴

VII. THE BAILEE'S OBLIGATION OF DELIVERY

One of the most important questions regarding documents of title involves the circumstances under which the bailee is relieved from liability for failure to deliver the goods. These excuses for delivery are found in various sections of the current Michigan statutes.¹⁹⁵ The Code undertakes a comprehensive revision and sets forth excuses for non-delivery in sections 7-403 and 7-404. Under the Code the bailee is required to deliver the goods to the person entitled to them under the document unless one of the following listed excuses is established by the bailee.

A. *"Delivery of the Goods to a Person Whose Receipt Was Rightful as Against the Claimant"*¹⁹⁶

This clause covers the case where goods are warehoused by a person not entitled to them, such as a thief, and returned to the owner upon his demand,¹⁹⁷ and would not change Michigan law.¹⁹⁸ It is assumed here that the owner has not acted in a way which would prevent him from later claiming title.¹⁹⁹

B. *"Damage to or Delay, Loss or Destruction of the Goods for Which the Bailee Is Not Liable [, but the Burden of Establishing Negligence in Such Cases Is on the Person Entitled Under the Document]"*²⁰⁰

Under this heading falls the bailee's excuse that it has observed the required standard of care already discussed but that the goods have nevertheless been damaged or destroyed.²⁰¹ This subsection would not change Michigan law.²⁰²

¹⁹⁴ *Stapleton v. Grand Trunk Ry.*, 133 Mich. 187, 94 N.W. 739 (1903); *Barber v. Detroit, G.H. & M. Ry.*, 197 Mich. 643, 164 N.W. 377 (1917); [1915] MICH. ATT'Y GEN. REP. 550.

¹⁹⁵ See UNIFORM WAREHOUSE RECEIPTS ACTS §§ 8-12, 16, 19, MICH. COMP. LAWS §§ 443.8-.12, .16, .19 (1948), MICH. STAT. ANN. §§ 19.428-.432, .436, .439 (1959), and UNIFORM BILLS OF LADING ACT §§ 11-15, 19, 22, MICH. COMP. LAWS §§ 482.11-.15, .19, .22 (1948), MICH. STAT. ANN. §§ 22.1131-.1135, .1139, .1142 (1937).

¹⁹⁶ UNIFORM COMMERCIAL CODE § 7-403 (1) (a).

¹⁹⁷ *Cf. Roehl Storage Co. v. Wilson*, 268 Mich. 691, 256 N.W. 598 (1934); UNIFORM COMMERCIAL CODE § 7-403, comment 2.

¹⁹⁸ UNIFORM WAREHOUSE RECEIPTS ACT § 9(a), MICH. COMP. LAWS § 443.9(a) (1948), MICH. STAT. ANN. § 19.429(a) (1959), UNIFORM BILLS OF LADING ACT § 12(a), MICH. COMP. LAWS § 482.12(a) (1948), MICH. STAT. ANN. § 22.1132(a) (1937).

¹⁹⁹ UNIFORM COMMERCIAL CODE § 7-403, comment 2; *cf.* §§ 7-503 (1), -504 (1).

²⁰⁰ UNIFORM COMMERCIAL CODE § 7-403 (1) (b).

²⁰¹ See part VI *supra*.

²⁰² UNIFORM WAREHOUSE RECEIPTS ACT §§ 8, 21, MICH. COMP. LAWS §§ 443.8, .21

The language inside the brackets is optional and was included because there is a substantial conflict on this point among the various states and uniformity here was not considered essential.²⁰³ The present Michigan statutes place the burden of proving the existence of an excuse on the warehouseman or carrier.²⁰⁴ In the case of goods deposited with a warehouseman which are later found to be damaged, the decisions indicate that the claimant must show that the goods were deposited in good condition and then the burden is placed upon the warehouseman to prove that the loss was not caused by his failure to exercise reasonable care.²⁰⁵ An analogous rule is applicable to carriers²⁰⁶ and adoption of the Code without the optional language would not change Michigan law.

C. *"Previous Sale or Other Disposition of the Goods in Lawful Enforcement of a Lien or on Warehouseman's Lawful Termination of Storage"*²⁰⁷

This is in accord with Michigan law.²⁰⁸ The extent of the right to sell or otherwise dispose of the goods is discussed in following sections.²⁰⁹

D. *"The Exercise by the Seller of His Right To Stop Delivery Pursuant to the Provisions of the Article on Sales (Section 2-705)"*²¹⁰

While the right of stoppage is currently recognized in Michigan,²¹¹ there is no express provision that rightful exercise of this privilege would provide an excuse for the bailee. Such an excuse

(1948), MICH. STAT. ANN. §§ 19.248, .441 (1959); UNIFORM BILLS OF LADING ACT § 11, MICH. COMP. LAWS § 482.11 (1948), MICH. STAT. ANN. § 22.1131 (1937).

²⁰³ UNIFORM COMMERCIAL CODE § 7-403, comment 3.

²⁰⁴ UNIFORM WAREHOUSE RECEIPTS ACT § 8(c), MICH. COMP. LAWS § 443.8(c) (1948), MICH. STAT. ANN. § 19.428(c) (1959); UNIFORM BILLS OF LADING ACT § 11(c), MICH. COMP. LAWS § 482.11(c) (1948), MICH. STAT. ANN. § 22.1131(c) (1937).

²⁰⁵ Schwartz v. Michigan Warehouse Co., 219 Mich. 401, 189 N.W. 1 (1922); Rath Packing Co. v. Cold Storage Co., 222 Mich. 315, 192 N.W. 639 (1923); Price & Pierce, Ltd. v. Jarka Great Lakes Corp., 37 F. Supp. 939 (W.D. Mich. 1941); Thomas Canning Co. v. Pere Marquette Co., 211 Mich. 326, 178 N.W. 85 (1920).

²⁰⁶ A. F. Young & Co. v. Grand Rapids & Ind. Ry., 201 Mich. 39, 167 N.W. 11 (1918); see also 3 CALLAGHAN'S MICHIGAN PLEADING AND PRACTICE § 36.157 (1946).

²⁰⁷ UNIFORM COMMERCIAL CODE § 7-403(1)(c).

²⁰⁸ UNIFORM WAREHOUSE RECEIPTS ACT § 36, MICH. COMP. LAWS § 443.36 (1948), MICH. STAT. ANN. § 19.456 (1959); UNIFORM BILLS OF LADING ACT § 27, MICH. COMP. LAWS § 482.27 (1948), MICH. STAT. ANN. § 22.1147 (1937).

²⁰⁹ See parts VIII and IX *infra*.

²¹⁰ UNIFORM COMMERCIAL CODE § 7-403(1)(d).

²¹¹ UNIFORM SALES ACT §§ 57-59, MICH. COMP. LAWS §§ 440.57-59 (1948), MICH. STAT. ANN. §§ 19.297-299 (1959).

would come under the catch-all of delivery to a person lawfully entitled to the goods.²¹² Since under the Code the existence of the excuse depends upon the validity of the stoppage,²¹³ the bailee is given a right to recover from the seller damages incurred by honoring an improper order to stop.²¹⁴ There is no present Michigan statute giving such a right.

E. *"A Diversion, Reconsignment or Other Disposition Pursuant to the Provisions of This Article (Section 7-303) or Tariff Regulating Such Rights"*²¹⁵

The practice of diversion and reconsignment has already been briefly mentioned in discussing the rights of the original consignee against the substituted consignee under a straight bill of lading.²¹⁶ The carrier's liability for honoring a change in directions by either the consignor or consignee is the second aspect of this problem.

The UBLA, currently in force in Michigan, authorizes delivery by the carrier either to the person lawfully entitled to the goods, the consignee under a non-negotiable bill, or the person in possession of a properly indorsed negotiable bill of lading.²¹⁷ There are situations in which the carrier may have notice that there are adverse claims to the goods. This can happen when a seller attempts to divert and the buyer objects. If the carrier knows or has notice that there are conflicting claims to the goods it may safely deliver only to the person lawfully entitled to them.²¹⁸ In practice this may force the carrier to retain the goods until the conflicting claims are resolved.²¹⁹ In an attempt to permit prompt disposition of the goods, the Code sets forth circumstances under which the carrier may deliver the goods and be protected from misdelivery.

²¹² UNIFORM WAREHOUSE RECEIPTS ACT § 9(a), MICH. COMP. LAWS § 443.9(a) (1948), MICH. STAT. ANN. § 19.429(a) (1959); UNIFORM BILLS OF LADING ACT § 12(a), MICH. COMP. LAWS § 482.12(a) (1948), MICH. STAT. ANN. § 22.1132(a) (1937).

²¹³ The use of the term "right to stop" in UNIFORM COMMERCIAL CODE § 7-403(1)(d) indicates that unless the right actually exists under § 2-705, the bailee is not given an excuse. Section 2-705, comment 1, merely states the bailee may be liable to buyer if the stoppage is unjustified.

²¹⁴ UNIFORM COMMERCIAL CODE §§ 2-705(3)(b), 7-504(4), comment 1.

²¹⁵ UNIFORM COMMERCIAL CODE § 7-403(1)(e).

²¹⁶ Part IV-H *supra*.

²¹⁷ UNIFORM BILLS OF LADING ACT § 12, MICH. COMP. LAWS § 482.12 (1948), MICH. STAT. ANN. § 22.1132 (1937).

²¹⁸ UNIFORM BILLS OF LADING ACT § 13, MICH. COMP. LAWS § 482.13 (1948), MICH. STAT. ANN. § 22.1133 (1937).

²¹⁹ See BRAUCHER, DOCUMENTS OF TITLE 39 (1958).

Even when there are conflicting instructions the carrier is protected if it delivers to the holder of a negotiable bill or the consignor on a non-negotiable bill.²²⁰ In the absence of conflicting instructions it may deliver to the consignee on a non-negotiable bill if the goods have either arrived at the billed destination or if the consignee is in possession of the bill.²²¹ It may also still follow the instructions of the consignee on a non-negotiable bill and take the chance that it will be determined that the consignee was entitled to them.²²²

As to both carriers and warehouseman, the Code continues present permission for use of an action of interpleader by the bailee and the carrier may avail itself of this alternative when there are conflicting claims.²²³

F. *"Release, Satisfaction or Any Other Fact Affording a Personal Defense Against the Claimant; and Any Other Lawful Excuse"*²²⁴

These last two clauses are designed to cover any other valid acts by the bailee. The phrase "and any other lawful excuse" was added because of fears expressed by bailees that they might be subjected to double liability if they surrendered goods under compulsion of legal process.²²⁵

Section 7-404 provides the last protection for the bailee.

"A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document or pursuant to this Article is not liable therefor. This rule applies even though the person from whom he received the goods has no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them."

²²⁰ UNIFORM COMMERCIAL CODE § 7-303 (1) (a), (b).

²²¹ UNIFORM COMMERCIAL CODE § 7-303 (1) (c).

²²² UNIFORM COMMERCIAL CODE § 7-303 (1) (d).

²²³ UNIFORM COMMERCIAL CODE § 7-603. Cf. UNIFORM WAREHOUSE RECEIPTS ACT §§ 17, 18, MICH. COMP. LAWS §§ 443.17, .18 (1948), MICH. STAT. ANN. §§ 19.437, .438 (1959); UNIFORM BILLS OF LADING ACT §§ 20, 21, MICH. COMP. LAWS §§ 482.20, .21 (1948), MICH. STAT. ANN. §§ 22.1140, .1141 (1937).

²²⁴ UNIFORM COMMERCIAL CODE § 7-403 (1) (f), (g). In *Bunell v. Ward*, 241 Mich. 404, 217 N.W. 68 (1928), a warehouseman delivered goods represented by a negotiable receipt to one member of the partnership without canceling the receipt. The warehouseman was held not liable to the other partner on the ground that delivery could probably be made to one partner as bailor. This is an example of an excuse under § 7-403 (1) (f).

²²⁵ Braucher, *In Re Article 7*, 28 TEMP. L.Q. 565, 573-75 (1955).

In *Adel Precision Products Corp. v. Grand Trunk W.R.R.*²²⁶ the carrier was held liable when it delivered goods against an order bill of lading on which the necessary indorsement had been forged. The comment to section 7-404 appears to indicate a contrary result.²²⁷

Where there are conflicting claims section 7-404 might protect the bailee if he delivered to the claimant not entitled to them but claiming under the document. It has been suggested, however, that "observance of reasonable commercial standards" requires the bailee to force judicial resolution of the quarrel through an action of interpleader.²²⁸

Section 31 of the UWRA²²⁹ states expressly that a condition of the right to demand goods is satisfaction of the warehouseman's lien and the warehouseman may withhold possession until it is so satisfied. Under the Code the lien must be satisfied if the bailee requests or if the bailee is prohibited by law from delivering without payment.²³⁰ There is no express statement that the claimant must satisfy the lien. The bailee's right to detain until paid is implied.²³¹

The Code [and this is also true in Michigan at present] requires the claimant to surrender outstanding negotiable documents for cancellation or notation of partial delivery. If the bailee does not insist upon this, he will be liable to any person to whom the document is duly negotiated.²³² The bailee need not obtain surrender of the document when it has conferred no right in the goods against the claimant.²³³ The UWRA and UBLA provide that after the bailee has lawfully disposed of the goods to satisfy his lien or because of their perishable quality he shall not thereafter be liable

²²⁶ 332 Mich. 519, 51 N.W. 922 (1952) (applying federal law).

²²⁷ "The section applies to delivery to a fraudulent holder of a valid document as well as to the holder of an invalid document." UNIFORM COMMERCIAL CODE § 7-404, comment. *But see* BRAUCHER, DOCUMENTS OF TITLE 32 (1958).

²²⁸ BRAUCHER, DOCUMENTS OF TITLE 33 (1958).

²²⁹ MICH. COMP. LAWS § 443.31 (1948), MICH. STAT. ANN. § 19.451 (1959). See also UNIFORM WAREHOUSE RECEIPTS ACT § 8(a), MICH. COMP. LAWS § 443.8(a) (1948), MICH. STAT. ANN. § 19.428(a) (1959); UNIFORM BILLS OF LADING ACT § 11(a), MICH. COMP. LAWS § 482.11(a) (1948), MICH. STAT. ANN. § 22.1131(a) (1937).

²³⁰ UNIFORM COMMERCIAL CODE § 7-403(2).

²³¹ UNIFORM COMMERCIAL CODE § 7-209, comment 4.

²³² UNIFORM COMMERCIAL CODE § 7-403(3). *Cf.* UNIFORM WAREHOUSE RECEIPTS ACT § 12, MICH. COMP. LAWS § 443.12 (1948), MICH. STAT. ANN. § 19.432 (1959); UNIFORM BILLS OF LADING ACT § 15, MICH. COMP. LAWS § 482.15 (1948), MICH. STAT. ANN. § 22.1135 (1937). See also MICH. COMP. LAWS § 444.8 (1948), MICH. STAT. ANN. § 19.493 (1959).

²³³ See UNIFORM COMMERCIAL CODE § 7-503(1)(a).

for non-delivery even to a holder of a negotiable document.²³⁴ These present sections have no counterpart in the Code but it is clear that the same rule of no duty to cancel the outstanding document would apply.²³⁵

The Code compels the bailee, in the absence of a valid excuse, to deliver the goods to the holder of a negotiable document or the person to whom delivery is to be made by the terms of, or pursuant to, written instructions under a non-negotiable document.²³⁶ It should be noted that due negotiation is not needed to be a holder. The only requirements are that he be in possession of a properly indorsed document of title.²³⁷

This section compels the bailee only to make delivery of what he has. Examination of other sections of article 7 shows that if the goods are misdescribed the bailee will be liable only to a party to or purchaser for value of a warehouse receipt,²³⁸ the consignee under a non-negotiable bill of lading who has given value in good faith, or the holder through due negotiation of a negotiable bill of lading.²³⁹

Current Michigan statutes expressly authorize the bailee to demand a receipt upon delivery.²⁴⁰ The Code does not continue this provision but a comment indicates recognition that this practice may continue.²⁴¹

VIII. THE WAREHOUSEMAN'S RIGHT TO TERMINATE STORAGE

Section 34 of the UWRA²⁴² defines the right of a Michigan warehouseman to terminate storage of goods. The right is given in three cases: where the goods are perishable, where they will deteriorate greatly in value, or where because of odor, leakage, in-

²³⁴ UNIFORM WAREHOUSE RECEIPTS ACT § 36, MICH. COMP. LAWS § 443.36 (1948), MICH. STAT. ANN. § 19.456 (1959); UNIFORM BILLS OF LADING ACT § 27, MICH. COMP. LAWS § 482.27 (1948), MICH. STAT. ANN. § 22.1147 (1937).

²³⁵ UNIFORM COMMERCIAL CODE § 7-403, comment 5. Cf. §§ 7-206 (4), (5), -210 (3), (6), -308 (2), (5).

²³⁶ UNIFORM COMMERCIAL CODE § 7-403 (1), (4).

²³⁷ UNIFORM COMMERCIAL CODE § 1-201 (20). Cf. § 7-501 (4).

²³⁸ UNIFORM COMMERCIAL CODE § 7-203.

²³⁹ UNIFORM COMMERCIAL CODE § 7-301 (1). Under this section, the consignee under a negotiable bill could not recover from the carrier unless he took the bill through due negotiation. Cf. § 7-501 (2) (b), (4).

²⁴⁰ UNIFORM WAREHOUSE RECEIPTS ACT § 8 (c), MICH. COMP. LAWS § 443.8 (c) (1948), MICH. STAT. ANN. § 19.428 (c) (1959); UNIFORM BILLS OF LADING ACT § 11 (c), MICH. COMP. LAWS § 482.11 (c) (1948), MICH. STAT. ANN. § 22.1131 (c) (1937).

²⁴¹ UNIFORM COMMERCIAL CODE § 7-104 comment.

²⁴² MICH. COMP. LAWS § 443.34 (1948), MICH. STAT. ANN. § 19.454 (1959).

flammability, or explosive nature they are likely to injure other property. If the goods are within one of the three above classes, the warehouseman must give reasonable notice to the owner or nominal depositor and if removal is not made during the period specified by the warehouseman, he may sell at public or private sale or otherwise dispose of them without liability. An earlier statute giving a right to dispose of perishable property held by a warehouseman is also found in the current compilations but is probably not applicable today.²⁴³

The Code revises this right to terminate storage in several respects. First, a general right is granted which applies to all goods stored. The warehouseman has a right to require removal at the end of the specified storage period or at the end of thirty days if no storage period is named. He must notify all known claimants to the goods and if they are not removed, he may sell them in accordance with the provisions provided for enforcement of his lien.²⁴⁴ The granting of this right would change Michigan law, for no general right to require removal exists at present. Second, the warehouseman is given a supplementary right to terminate storage where he believes in good faith that the goods will deteriorate or fall in value below the amount of his lien within a period which is shorter than the period in which he could dispose of the goods under his general right of termination already mentioned. If he exercises this right, he may specify a shorter reasonable time and sell the goods one week after the expiration of the period specified in his notice.²⁴⁵ Again the Code would change Michigan law. The right of termination based on the perishable quality of the goods is strictly limited to a case of decline in value below the amount of the lien instead of a great loss in value not necessarily impairing the lien. While this restricts action by warehousemen, the restriction is not onerous since the general right to terminate still exists.

Another supplementary right of termination is given in cases where the goods are hazardous. The sale may be public or private on reasonable notice. Again the Code would restrict the action of warehousemen because this right can be exercised only if the warehouseman had no notice of the quality or condition of the

²⁴³ MICH. COMP. LAWS § 444.22 (1948), MICH. STAT. ANN. § 19.512 (1959). This provision antedates passage of the Uniform Warehouse Receipts Act, and should be considered as repealed by implication.

²⁴⁴ UNIFORM COMMERCIAL CODE § 7-206 (1).

²⁴⁵ UNIFORM COMMERCIAL CODE § 7-206 (2).

goods at the time of storage.²⁴⁶ The theory is that the summary power of removal is not justified when the warehouseman accepted the goods knowing of the risk they involved.²⁴⁷ Of course, he may still avail himself of the general right of termination even though he had knowledge of the hazardous quality of goods at the time of deposit. In the interim period he would have to store the goods elsewhere to avoid loss to other depositors.

At present there are separate provisions in Michigan for the sale of unclaimed and perishable goods by carriers.²⁴⁸ No such distinction is recognized by the Code and no provision is made for termination of storage by a carrier. Under the Code the carrier would have a right to terminate storage and dispose of the goods only after it had acquired the status of a warehouseman. Consolidated treatment is used here since the carrier seeking to dispose of the goods is really seeking to terminate its status as a warehouseman.

IX. THE BAILEE'S LIEN

The final point for comparison is the extent of the lien which may be claimed for storage and shipment of the goods. The treatment of the warehouseman's lien under the Code will be explained and then any differences in the carrier's lien will be noted.

A. *The Warehouseman's Lien*

At present the warehouseman may claim two types of lien, a specific lien for charges relating to certain goods or a general lien on the same goods for charges relating to other goods of the same depositor.²⁴⁹ Where a negotiable receipt is issued, the warehouseman can claim only a specific lien for storage subsequent to the

²⁴⁶ UNIFORM COMMERCIAL CODE § 7-206 (3).

²⁴⁷ UNIFORM COMMERCIAL CODE § 7-206, comments 2 and 3.

²⁴⁸ UNIFORM BILLS OF LADING ACT § 27, MICH. COMP. LAWS § 482.27 (1948), MICH. STAT. ANN. § 22.1147 (1937), provides that the carrier will not be liable for failure to deliver goods lawfully sold because they are perishable or hazardous but does not state the conditions under which they may be sold. Other statutes fill out the picture. MICH. COMP. LAWS § 464.13 (1948), MICH. STAT. ANN. § 22.216 (1937) (sale of unclaimed freight and baggage, special provision for perishable goods); MICH. COMP. LAWS §§ 434.101-.112 (1948), MICH. STAT. ANN. §§ 18.721-.732 (1937) (disposition of unclaimed property); MICH. COMP. LAWS § 468.321 (1948), MICH. STAT. ANN. § 22.751 (1937) (sale of animals and perishable freight by common carriers).

²⁴⁹ UNIFORM WAREHOUSES RECEIPTS ACT §§ 27, 28 (a), MICH. COMP. LAWS §§ 443.27, .28 (a) (1948), MICH. STAT. ANN. §§ 19.447, .448 (a) (1959).

date of the receipt unless he expressly enumerates the charges which he wishes to claim.²⁵⁰

The Code recognizes the existence of both a specific and general lien but makes the following changes:²⁵¹

1. A general lien can be claimed, even in a negotiable receipt, merely by so stating but,

2. Where a receipt is duly negotiated, the charges against the goods can be enforced only where there is a statement of a specific amount and rate, otherwise there can be a charge only for reasonable storage charges subsequent to the date of the receipt.

The Code departs from present law by providing specifically that the warehouseman may also reserve a security interest in the goods deposited. This will be used by the warehouseman who is also in the financing business. The warehouse receipt must specify the maximum amount for which a security interest is claimed but in all other respects the validity of the security interest and rights on default will be governed by article 9 of the Code which deals with secured transactions.²⁵²

Where goods are deposited by a person other than the owner and the warehouseman asserts a lien, the validity of his lien rests upon whether the depositor could have made a pledge of the goods which would have been valid as against the true owner.²⁵³ This test is continued by the Code.²⁵⁴

The warehouseman would continue to lose his lien by voluntary delivery or by unjustified refusal to deliver.²⁵⁵ The Code further specifically provides that the general lien attaches to the balance of goods remaining in the hands of the warehouseman.²⁵⁶

B. *Enforcement of the Warehouseman's Lien*

Unlike the UWRA²⁵⁷ the Code provides two sale procedures for the enforcement of a warehouseman's lien, one much more lib-

²⁵⁰ UNIFORM WAREHOUSE RECEIPTS ACT § 30, MICH. COMP. LAWS § 443.30 (1948), MICH. STAT. ANN. § 19.450 (1959).

²⁵¹ UNIFORM COMMERCIAL CODE § 7-209 (1).

²⁵² UNIFORM COMMERCIAL CODE § 7-209 (2).

²⁵³ UNIFORM WAREHOUSE RECEIPTS ACT § 28 (b), MICH. COMP. LAWS § 443.28 (b) (1948), MICH. STAT. ANN. § 19.448 (b) (1959); cf. *Roehl Storage Co. v. Wilson*, 268 Mich. 691, 256 N.W. 598 (1934).

²⁵⁴ UNIFORM COMMERCIAL CODE § 7-209 (3).

²⁵⁵ UNIFORM COMMERCIAL CODE § 7-209 (4); cf. UNIFORM WAREHOUSE RECEIPTS ACT § 29, MICH. COMP. LAWS § 443.29 (1948), MICH. STAT. ANN. § 19.449 (1959); *Collins v. Kent Storage Co.*, 228 Mich. 137, 199 N.W. 634 (1924).

²⁵⁶ UNIFORM COMMERCIAL CODE § 7-209 (1).

²⁵⁷ UNIFORM WAREHOUSE RECEIPTS ACT § 33, MICH. COMP. LAWS § 443.33 (1948), MICH. STAT. ANN. § 19.453 (1959).

eral than the other. The first alternative permits a public or private sale on terms which are commercially reasonable after notification of all known claimants.²⁵⁸ However, the warehouseman may use this procedure only if the goods have been stored by a merchant in the ordinary course of his business.²⁵⁹ Liens on goods of all other depositors must be enforced under the second alternative which involves more steps and carefully laid out procedure.²⁶⁰ The first alternative is simpler but where the warehouseman has doubts about the status of his depositor he may use the second alternative.²⁶¹

Apart from technical revision and simplification of the sale procedure, the Code makes a few changes and clarifications. The warehouseman is specifically given the right to bid at a public sale;²⁶² by negative implication he is denied the right to bid at a private sale.²⁶³ Further, the title of a purchaser in good faith at the foreclosure sale is protected although the seller fails to comply with all the technical requirements of the statute.²⁶⁴ This is an attempt to make such sales more attractive and to obtain better prices.²⁶⁵

C. *The Carrier's Lien*

The Code grants a carrier a specific lien somewhat more limited than the one granted to a warehouseman.²⁶⁶ Where a negotiable bill of lading is issued for the goods, as against a purchaser for value, the carrier is limited to charges stated in the bill or tariffs or to a reasonable charge if none are stated.²⁶⁷

No provision is made for a general lien or security interest in favor of a carrier because carriers do not commonly claim a lien for services performed in connection with other goods nor do they lend money. However, if the practice of the carriers is otherwise, the Code would not deny them a general lien or security interest which was valid under other state law.²⁶⁸

²⁵⁸ UNIFORM COMMERCIAL CODE § 7-210 (1).

²⁵⁹ UNIFORM COMMERCIAL CODE § 7-210 (2).

²⁶⁰ UNIFORM COMMERCIAL CODE § 7-210 (2).

²⁶¹ UNIFORM COMMERCIAL CODE § 7-210 (8).

²⁶² UNIFORM COMMERCIAL CODE § 7-210 (4).

²⁶³ BRAUCHER, DOCUMENTS OF TITLE 50 (1958).

²⁶⁴ UNIFORM COMMERCIAL CODE § 7-210 (5).

²⁶⁵ UNIFORM COMMERCIAL CODE § 7-210, comment 2; cf. §§ 2-706 (5), 9-504 (4).

²⁶⁶ UNIFORM COMMERCIAL CODE § 7-307 (1); cf. § 7-209 (1). See BRAUCHER, DOCUMENTS OF TITLE 43 (1958).

²⁶⁷ UNIFORM COMMERCIAL CODE § 7-307 (1); cf. § 7-209 (1) (lien limited when receipt duly negotiated).

²⁶⁸ UNIFORM COMMERCIAL CODE § 7-307, comment; cf. § 7-105.

Where a carrier is required by law to accept goods for transportation, its specific lien is valid as against any person unless the carrier had notice that the consignor lacked the authority to ship the goods. If the carrier is not required to accept the goods, the specific lien is valid against anybody entrusting possession to the consignor unless the carrier has notice of lack of authority to ship.²⁶⁹ This would change Michigan law.

In *Fitch v. Newberry*²⁷⁰ plaintiffs sued a carrier in replevin for goods which it had carried from Troy, New York, to Detroit. The carrier would not release the goods until it was paid for the carriage. The plaintiffs had advanced the freight charges to X who had sent the goods without prepayment from Troy. The carrier argued that since it was required to accept the goods for delivery it should have a lien for freight charges. The court rejected the carrier's claim on the theory that it was required to accept the goods only when the consignor had power to subject them to a lien for freight charges. Since there was no authority in X to do this, the carrier was not required to accept and judgment was for the plaintiffs. Under the Code, the carrier would prevail.

D. *Enforcement of the Carrier's Lien*

The carrier is given a right to sell the goods which is similar to the first alternative for warehouseman, namely the right to sell in a commercially reasonable manner.²⁷¹ Moreover, because the carriers were worried about the vagueness of the term "commercially reasonable," they were given authority to use the more detailed and strict second alternative available to warehouseman.²⁷²

CONCLUSION

In retrospect, article 7 does not appear to be revolutionary in concept. Of course, the new terminology and statutory scheme will be in some respects alien to those accustomed to the present uniform acts. On the other hand, it seems that this article as a whole is a well constructed improvement on the current statutes. While the Uniform Commercial Code must finally be judged on its ten articles as a unit, article 7 supports a favorable view of the statute.

²⁶⁹ UNIFORM COMMERCIAL CODE § 7-307 (2).

²⁷⁰ 1 Doug. 1 (Mich. Sup. Ct. 1843).

²⁷¹ UNIFORM COMMERCIAL CODE § 7-308.

²⁷² UNIFORM COMMERCIAL CODE § 7-307 (7). Braucher, *In Re Article 7*, 28 TEMP. L.Q. 564, 571 (1955).